USCA NOS. 00-99005 and 00-99006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS,
Petitioner-Appellant/Cross-Appellee,

v.

JILL BROWN, Warden, San Quentin State Prison,
Respondent-Cross-Appellant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DC No. CV-92-0465-DT

DEATH PENALTY CASE

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

David S. Olson (SBN 127264)
KULIK, GOTTESMAN, MOUTON & SIEGEL, LLP
15303 Ventura Boulevard, Suite 1400
Sherman Oaks, California 91403
Telephone: (818) 817-3600
Facsimile: (310) 557-0224
Attorneys for Petitioner-Appellant/Cross-Appellee
Stevie Lamar Fields

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION AND STATEMENT OF COUNSEL

A. The Panel Opinion Permits a Divided Jury to Rely on Written Notes of Extrinsic Biblical Passages and Dictionary Definitions

The panel opinion in Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005) ("Fields"), reinstates a death sentence overturned by District Court Judge Dickran Tevrizian in this pre-AEDPA proceeding. The opinion merits rehearing and, Petitioner suggests, *en banc* rehearing. It holds that a capital defendant's constitutional rights were not violated even though his jury resolved a split on whether to return a death sentence by considering the jury foreman's extensive notes--prepared at home--of Biblical verses that command the imposition of the death penalty, as well as dictionary definitions of legal terms relevant to the deliberations. Fields at 1209.[1]

The opinion cannot be reconciled with Sixth Amendment jurisprudence requiring jurors to base their verdicts only on the evidence at trial and the court's instructions. Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) ("trial by jury . . . necessarily implies at the very least that" the

---

[1] The notes reference as reasons "for" the death penalty: **"placate gods,"** "eye for eye," and state, among other things: "Genesis 9:6 '**Whoso sheddeth man's blood by man shall his blood be shed, for in the image of God made He man**' . . . "
"New Test . . . **Romans 13:1-5** 'Let everyone be subject to the higher authorities, for **there exists no authority except from God**, and those who exist have been appointed by God. Therefore, **he who resists the authority, resists the ordinance of God; and they that resist bring on themselves condemnation** 'For rulers are a terror not to the good work but to the evil. Dost thou wish, then, not to fear the authority? '**Do what is good and thou will have praise from it. For it is God['s] minister to thee for good. But if thou dost what is evil, fear, for not without reason does it carry the sword. For it is God's minister, an avenger to execute wrath on him who does evil**. . . . '" "Luther, Calvin, Aquinas felt this to be supportive of capital punishment. . . ." Fields at 1206 n.12 (emph. added).

evidence "shall come from the witness stand . . . where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel"); Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2001) (habeas relief where prosecutor paraphrased Romans 13:1-5--one of the religious passages in this case--in his closing argument).

The District Court found a majority of the jurors voted for a life sentence before the religious authority and definitions were discussed and held that the extrinsic matter had a "substantial and injurious effect" on the verdict. It stated the extrinsic materials "contaminate[d] the procedure and process," and that "the jury in this case did not apply the law during the penalty phase of the trial" but rather "made up their own law."[2] ER 226 at 17; 2000 ER 229 at 5.[3]

The panel opinion does not dispute the findings below. Instead--even while acknowledging that "Biblical verses are not the sort of material that should have been made part of the record"--the opinion holds that a jury may nonetheless consider "Bible verses" because they are "common knowledge in the sense that they are part of the pool of information that many people possess." Fields at 1209. The opinion relies on but misapprehends cases that recognize that a juror typically may bring his experience and general knowledge to bear on evidence admitted at trial. E.g., Head v. Hargrave, 105 U.S. 45, 49, 26 L.Ed. 1028 (1881).

---

[2] The notes state, among other things: "extenuation" is defined as "gloss over . . . loophole," and "[t]he proper object of extenuate in its sense of making excuses for is a word expressing something bad in itself, as guilt, cowardice, cruelty," and "Mitigate-- . . . gentle, mild, abate, lessen." Fields at 1207 n.13.

[3] "2000 ER" refers to the Excerpts submitted with the earlier 2000 appeals.

The new rule goes far beyond the existing precedent and permits consideration of extrinsic matter wholly unrelated to evidence introduced at trial--including religious verses--thus raising issues of extraordinary importance concerning an accused's right to have his case decided solely on the evidence and the court's instructions. Any jury in this Circuit may now consider "Bible verses" because they have been declared to comprise "common knowledge" that "many people possess." Juries could presumably even bring the Bible to deliberations because it is a more accurate source than notes made by a juror.

For years there has been a clear line prohibiting a jury from going beyond the evidence at trial--which must be admitted under the rules of evidence and can then be tested, questioned, and rebutted or relied upon by the non-admitting party, with assistance of counsel. The opinion obliterates that line and substitutes an unworkable new rule.[4]

The opinion is irreconcilable with the requirement that death "may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider," and cases recognizing that "Biblical concepts of vengeance" do not satisfy "such a

---

[4] The opinion does not state if "many people" refers to jurors who served on a case, those on the panel, or the general population of a jurisdiction or the nation. The opinion does not explain how "many" is to be defined (e.g., 25 %, 51%, 75%) or "common knowledge" discerned. The opinion raises the question of whether other religious sources, such as the Koran for example, could be considered in communities that have a sizeable Muslin population, or whether only Judeo-Christian religious tenets can be considered.

refined approach." Sandoval, supra, 241 F.3d at 776, citing, *inter alia*, Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The opinion is irreconcilable with the requirement that "the jury's own sense of responsibility for imposing the death penalty" may not constitutionally be "undercut." Sandoval at 777, citing to, Caldwell v. Mississippi, 472 U.S. 320, 330-34, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The opinion conflicts with this Court's decision in Sandoval, which called just one of the passages at issue here--Romans 13:1--"strong medicine." Sandoval, supra, 241 F.3d at 778. The opinion agrees that the prosecutor's "invocation of 'higher law'" in Sandoval violated the requirement of narrowly channeled sentencing discretion and undercut the jury's sense of responsibility, but fails to explain why those same violations do not arise when a juror, instead of a prosecutor, administers the "strong medicine." Fields at 1209-10. Sandoval itself relies on a case where the juror injected the higher law. 241 F.3d at 776-77, citing, Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989).

The opinion states that in Sandoval, the prosecutor "frustrated the purpose of" closing argument. Fields at 1209. But Sandoval notes that purpose is to "explain to the jury what it has to decide and what evidence is relevant," and this Court found error there because of the argument's impact *on the jury*: "The jury's decision is to be based on the evidence . . . and the legal instructions given by the

court. . . . Argument urging the jury to decide the matter based upon [other] factors . . . is improper." Sandoval, 241 at 776 (citations omitted).[5]

That prosecutors may be "constrained" in ways that a juror is not (Fields at 1209) thus misses the point. The constitutional infirmities arising from injection of religious law to return a death sentence--1) vitiating the right to counsel, confrontation, and cross-examination, 2) preventing the jury's discretion from being constitutionally channeled, and 3) undercutting the jurors' responsibility for the death sentence--occur whenever a higher law is placed before a jury, regardless of the manner in which, or from whom, the higher law came, and the prejudice inures from the "strong" and persuasive influence religious mandates have. This Court has even recognized that it "may be more serious" when constitutional rights are denied by a jury's consideration of extrinsic evidence "than where these rights are denied at some other stage of the proceedings" because it "is impossible to offer evidence to rebut" the extrinsic matters, a curative instruction, or "to discuss its significance in argument . . . or to take other tactical steps that might ameliorate its impact." Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987).

Whether a defendant is to be executed should thus not turn on how the religious mandates that "contaminated the process" were injected.

The opinion also fails to apply the established test for prejudice in this Circuit (e.g., Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986)), and

[5] "The obvious danger" with "any suggestion" that a jury may consider a higher law is that "the jury will give less weight to, or perhaps even disregard, the legal instructions" in favor of that "higher law." Sandoval, supra, 241 F.2d at 776. That is what Judge Tevrizian found happened here. 2000 ER 229 at 5.

misapplies the test for prejudice from trial error as enunciated by the Supreme Court, including by speculating as to what the jury might have done in the absence of the extrinsic materials instead of focusing on their impact. The opinion thus does not consider the telling jury vote that occurred before the notes were discussed, in which *seven jurors* voted for a life sentence. ER 108 at Ex. 7.

B. The Panel Opinion Fails to Apply the Proper Legal Standards to the Biased Juror Claim

Juror Hilliard's wife was the victim of crimes "quite similar" to Petitioner's crimes. She was kidnapped at gunpoint into a car, driven away, pistol whipped, robbed, and raped. This experience was traumatic for the Hilliards. Fields v. Woodford, 309 F.3d 1095, 1105 (9th Cir. 2002) ("Fields I"); Fields at 1192.

The crimes occurred two and a half years before Petitioner's trial, in Lynwood, California, a ten-minute drive from where Petitioner's crimes occurred.[6] The assailant, a slender African-American in his twenties--like Petitioner then--threatened to return to "finish off" Ms. Hilliard as he fled. Ms. Hilliard attended line-ups through within at least six months of Petitioner's trial but no arrests were ever made. ER 351 at 15:24-16:5, 23:24-24:5, 26:22-27:13, 32:23-33:2, 34:19-36:21; ER 352 at 17:2-3; Fields I, 309 F.3d at 1105.

Hilliard did not disclose during voir dire: 1) the rape and kidnap crimes against his wife, 2) the dramatic effect this attack had on their lives, and 3) his purported resulting "misgivings" about serving as a juror on Petitioner's case and

[6] The Hillards were married five years at the time. They had and have a "close" and "loving" relationship. ER 351 at 15:4-7, 16:14-20; ER 352 at 10:4-8.

desire not to serve. ER 352 at 38:12-39:2; ER 256, Ex. 4 at 173-74.

The Hilliards discussed Petitioner's case during trial.[7] Based solely on these discussions, Ms. Hilliard came to believe there was "a pretty good possibility" that Petitioner was her assailant, told Hilliard of her suspicions, and asked him *on a nightly basis* if she could attend trial to identify Petitioner. ER 351 at 42:15-48:16; ER 352 at 52:10-13, 55:19-56:6.[8]

Hilliard refused her requests because he did not want to "compromise" his seat on the jury if his wife "in fact . . . did ID [Petitioner] as the perpetrator." ER 352 at 56:9-57:9; 60:2-15. Also, he did not want her "traumatized" by the evidence--which he knew was so similar to the crimes against her. In fact, Hilliard had "memories" of the attack on his wife "triggered" by the evidence at Petitioner's trial. ER 352 at 37:15-22; 61:3-7.

The panel opinion raises questions of extraordinary importance as to the constitutional guaranty of "indifferent and impartial" jurors to secure the "priceless" right to trial by jury. Irvin v. Dowd, 366 U.S. 717, 721-22, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

---

[7] Everything Ms. Hilliard knew about the case came from these discussions. Hilliard told her: 1) "the nature of the case," 2) the crimes with which Petitioner was charged, 3) that Petitioner was a young African-American, 4) that his crimes occurred in South Central Los Angeles, and 5) that Petitioner abducted and killed a female. ER 351 at 43:1-22, 43:23-25, 44:1-19, 47:24-48:6, 68:2-4.

[8] One purpose of the remand was to determine if the Hilliards had "improper communications" during trial, for example, whether Ms. Hilliard "told Hilliard of her suspicions." Fields I, 309 F.3d at 1106. The District Court found the Hilliards had nightly conversations that "revolved around Mrs. Hilliard's concern that Petitioner might be" her assailant. ER 275 at 46.

The opinion fails to apply the presumption of prejudice arising from the conversations the Hilliards had. Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (communications between juror and third parties that are "possibly prejudicial" invalidate a verdict "unless their harmlessness is made to appear"); Caliendo v. Warden of California Men's Colony, 365 F.3d 691, 696-97 (9th Cir. 2004) (government must make a "strong contrary showing" to overcome Mattox presumption). The District Court did not apply the presumption and thus it was error for the opinion to rely on its findings here. Id. at 698.

As to implied bias, the opinion relies on the District Court's determination Hilliard was not actually biased--based on Hilliard's say-so--but the standard for implied bias is objective and it is irrelevant that the juror believes or says he was impartial. Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) ("juror's assurances" of impartiality "cannot be dispositive of the accused's rights"); United States v. Gonzalez, 214 F.3d 1109, 1111-13 (9th Cir. 2000) (jurors are reluctant to admit bias; courts thus imply bias on "the objective facts . . . even where the juror . . . asserts (or even believes) that he . . . can and will be impartial"). Finally, under Williams v. Taylor, 529 U.S. 420, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000), Hilliard's omissions during voir dire also show bias.

C. Defense Counsel Failed to Investigate and Present Mitigating Evidence

No court that has reviewed this case--including the panel opinion--has disputed the findings of a state referee that there was "simply no credible, tactical, or other reason advanced to justify a virtual absence of penalty phase

investigation" and that the investigation "fell below minimum standards." 2000 ER 285 at 15, 18. The panel opinion ignores material facts and directly pertinent precedent as to the resulting prejudice.

II. THE PANEL OPINION PERMITS RESORT TO HIGHER LAW AND DICTIONARY DEFINITIONS

A. The Opinion Adopts an Unprecedented New Rule

The District Court applied established law to its fact-findings and held Petitioner's rights to cross-examination, confrontation, and the assistance of counsel were violated. 2000 ER 239 at 2-4; ER 226 at 11-17. The panel opinion does not apply this Circuit's test for prejudice. Instead, it holds that "Bible verses" are "part of the pool of information that many people possess" and thus may be considered by a jury. Fields at 1207-09.

1. A Juror's Knowledge Can Be Brought to Bear Only on Evidence Admitted at Trial

The opinion relies on cases that merely confirm the general proposition that a juror may bring his experience and knowledge to bear on the evidence. From those cases, the opinion takes a quantum leap in concluding that "[s]haring notes is not constitutionally infirm if sharing memory isn't." Fields at 1209.

First, even a juror's knowledge and experience may only be brought to bear on evidence introduced at trial. United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991), citing to, Head v. Hargrave, supra, 105 U.S. 45 (jurors "cannot act in any case upon particular facts . . . resting in their private knowledge, but should be governed by the evidence adduced" although they may "judge the

weight and force of that evidence by their own general knowledge"). Thus, a jury's consideration of "personal experiences" itself constitutes "extrinsic evidence" in the absence of "any record evidence" on point. Navarro-Garcia, 926 F.2d at 821-22; See also, Grotemeyer v. Hickman, 393 F.3d 871, 880 (9th Cir. 2004) (not all "juror experience is proper grist for the deliberative mili"); Jeffries v. Blodgett, 5 F.3d 1180, 1190 n.2 (9th Cir. 1993) (that "extrinsic information came from a juror's personal knowledge rather than . . . an outside source has no bearing on our analysis").

Second, the foreman here went way behind sharing memory, experience, or general knowledge. See, People v. Harlan, 109 P.3d 616, 632 (Colo. 2005) (death sentence overturned where jury considered the Bible and notes of Biblical passages made by a juror, including "eye for eye" and Romans 13:1 (both at issue here), because Biblical text is written as the "voice of God and commands death as the punishment for murder," stating "[w]e expect jurors to bring their backgrounds and beliefs to bear on their deliberations but to give ultimate consideration only to the facts admitted and the law as instructed"); Bulger v. McClay, 575 F.2d 407, 412 (2d Cir. 1978) ("[courts] encourage jurors to bring their experiences to bear during deliberation. . . . Yet, where [extraneous] facts enter the" process, "the constitutional role of the jury is undermined, and the defendant is denied [a] fair trial").

Petitioner's claim raises only the propriety of a jury's consideration of *extrinsic*, written, religious materials--previously found to be "strong medicine"--

and dictionary definitions. But the opinion's entire premise--that a jury may consider Biblical verses and any other extrinsic matter injected from memory--is contrary to precedent because even memory, experience, or knowledge can only be brought to bear in understanding or evaluating evidence at trial, such as witness credibility. Grotemeyer, supra, 393 F.3d at 879.

2. The Cases Cited Do Not Support the New Rule

The cases cited in the opinion do not support its new rule. For example, in Hard v. Burlington N. R.R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989), a civil case, a motion for new trial was denied where a juror supposedly stated, based on his experience, that x-rays in evidence did not show the injuries alleged, because the trial court found what transpired during deliberations to be "inconclusive." This Court affirmed and stated that even if the juror had some knowledge "regarding x-ray interpretation" that would not justify relief because "jurors will bring their life experiences to bear on the facts of the case" and "a basic understanding of x-ray interpretation falls outside the realm of impermissible influence." Id. Nothing in Hard suggests a jury can resort to extraneous research unrelated to "the facts of the case"--let alone of religious authorities.

There is a material difference between a juror bringing his knowledge to bear on the evidence and conducting using extrinsic research to sway other jurors. Indeed, in Hard, this Court observed that a potential juror can be questioned about his "general knowledge, opinions, feelings, and bias," and thus biased jurors can be "root[ed] out." Id. at 1461; accord, Grotemeyer, supra, 393 F.3d at

878 (counsel use voir dire to learn about potential jurors and use challenges to "avoid jurors whose experience would give them excessive influence"). Thus, if x-ray interpretation is an issue, a potential juror can be asked about her knowledge in that regard. But a juror cannot be asked about research she may later decide to do.

There is also a material difference between a juror making comments on the evidence from general knowledge that can easily be rebutted by a responsive comment, and a jury considering written notes of religious mandates and definitions unrelated to the evidence. E.g., Harlan, supra, 109 P.3d at 632 (overturning death sentence where jurors discussed notes made by juror of Biblical passages, including "eye for an eye" and Romans 13:1, observing that "[t]he written word persuasively conveys . . . in a way the recollected spoken word does not").

In Bagnariol v. Walgren, 665 F.2d 877, 884 (9th Cir. 1981), cited in the opinion, a juror determined that a fictitious corporation used by undercover FBI agents was not listed in directories and reported this to the jury. This Court affirmed the ruling that "the juror misconduct" was not prejudicial, noting the extrinsic information not relevant to guilt since the evidence was undisputed the corporation did not exist. The extrinsic matter thus merely confirmed "what any reasonable juror already knew" based on the evidence. Id. at 884, 887-88. Bagnariol thus does not support a rule that a jury may consider Biblical verses not in evidence.

In Rodriguez v. Marshall, 125 F.3d 739, 742 (9th Cir. 1997), overruled on other grounds, Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002), cited in the opinion, there was uncontroverted evidence of the distance and travel time between two cities and testimony as to the description of a car stopped on the freeway. One juror reported his own calculations of the drive time and distance, and noted his inability to recall cars when driving. Id. at 743, 746.

This Court concluded there was no prejudice by the "juror misconduct" as to the travel time and distance, since the parties agreed on these facts at trial. Id. at 742-43. The juror's conclusions as to discerning cars were not prejudicial because they were "cumulative of evidence presented at trial" as "many witnesses testified" on that issue. Moreover, problems of perceiving objects while driving was the kind of common knowledge most jurors are presumed to possess and not "the kind of prejudicial material . . . routinely kept from the jury." Id. at 745, 747.[9]

Rodriguez thus involved application of the rule that a juror can bring his knowledge to bear on the evidence. The "juror misconduct" there was not prejudicial because the extrinsic information pertained to issues not in dispute or was cumulative of the evidence, and because it was not the type of material "routinely kept from the jury." Here, there was no evidence as to religious doctrines or dictionary definitions, the question of penalty was in dispute, and the notes contained materials routinely kept from a jury.

---

[9] The opinion ignores the critical second half of this language. Rodriguez cites Bagnariol and Hard for the "presumptive common knowledge" language, but those cases do not contain that language or support the proposition.

Finally, in McDowell v. Calderon, 107 F.3d 1351, 1367 (9th Cir. 1997), cited in the opinion, this Court affirmed a ruling that certain statements during deliberations were inadmissible. Nothing in McDowell supports the rule adopted in the panel opinion. McDowell indeed notes that the "type of after-acquired information that potentially taints a jury verdict" should be distinguished from the "general knowledge, opinions, feelings and bias that every juror carries into the jury room." Id. Here, what taints the death sentence are the "after-acquired" notes the foreman "carried into the jury room."

B. The Information Was Not Common Knowledge

Even if the law permitted consideration of extraneous material within the common knowledge of many people, the opinion does not cite any evidence or precedent that the Scriptures considered here, such as Romans 13:1-5, fit within that test. The foreman did not readily possess the information; he needed to do independent research. ER 106, Ex. 25 (foreman testimony that "one or two of the jurors express[ed] some misgivings about the death penalty" which "prompted" him to consult the Bible and take notes to bring to deliberations). Several jurors testified as to the impact this matter had when presented and thus it was apparently not previously known by the jurors. ER 106 at Ex. 12, ¶ 7 (declaration of juror Henry that she and several jurors favored a life sentence, that the foreman "was really pushing hard for a death sentence," and that the "references to and discussions of the religious citations were crucial in persuading those jurors who had supported a life sentence to change their mind"); ER 106 at Ex. 15 (juror

Hilliard testifying it was after notes were discussed "that we were able to reach a unanimous verdict"); ER 108 (foreman declaration that the notes "helped the jury . . . arrive at its verdict").[10]

C. The Opinion Ignores This Circuit's Test for Prejudice and the Evidence Showing Prejudice

1. The Extrinsic Matter Here Was of the Same Order of Magnitude as That Found Prejudicial in Other Cases

Instead of applying this Circuit's test for prejudice, the opinion concludes that "[t]o the extent that White's notes are extrinsic or improper," cases finding prejudice are of "a different order of magnitude" because the notes do not comprise "facts." Fields at 1209. But prejudicial error has been found from the use by a jury of dictionary definitions and from exposure to the same Biblical verses at issue here, as in Sandoval. E.g., Marino, supra, 812 F.2d at 505 (juror changed vote after receiving dictionary definition of "malice"); United States v. Martinez, 14 F.3d at 549-52 (11th Cir. 1994) (conviction overturned where two jurors "were leaning towards" acquittal but changed their votes after jury "used a dictionary to define several words, some with technical meanings").

Moreover, the opinion recognizes that the choice between life or death is both a question of fact "and a matter of reasoned moral judgment." Fields at 1209 (citation omitted). The Scriptures, factual or not, related to the "moral judgment" before the jury.

---

[10] The opinion does not state whether the definitions comprised "information that many people possess" but summarily concludes their consideration was not prejudicial. Fields at 1210.

In addition, it is fundamental to the integrity of the trial and right to trial by jury that a verdict be based on the evidence. Turner, supra, 379 U.S. at 472-73. Thus, contrary to the opinion's attempt to categorize the notes as non-factual and thus non-prejudicial, this Circuit rejects such bright line tests. Instead, the courts are to place great weight on the nature of the extraneous evidence. Courts consider "whether there is a 'direct and rational connection between the extrinsic material and a prejudicial jury conclusion.'" Rodriguez, supra, 125 F.3d at 744 (citation omitted).

The extrinsic materials here were not in evidence or the instructions, have been recognized as prejudicial, and were directly and rationally connected to the issue of penalty. As Judge Tevrizian put it:

> "[a] 'direct and rational' connection was present in this case. The jury was charged with determining whether to sentence Fields to life in prison . . . or death. . . . The extrinsic information related directly to . . . the decision . . . " and the "jury's use of Biblical references supporting the death penalty had the potential to be highly prejudicial, '[e]specially when, as here, such arguments come from a source which would likely carry weight with laymen and influence their decision.' [Citation omitted.]"

ER 226 at 15-16; see, id. at 16 (consideration of Biblical verses "violated the 'well-settled principle that religion may not play a role in the sentencing process'" and "'cannot be reconciled with the requirement'" that decision to impose death must result from discretion which is "'suitably directed and limited,'" citing Godfrey, supra, 446 U.S. at 428, and Jones v. Kemp, supra, 706 F. Supp. at 1559-60 (death sentence reversed based on presence of Bible in jury room because jury "had a

duty to apply the law of the State . . . not its own interpretation . . . of precepts of the Bible," giving as examples of prejudicial Biblical citations three of the very passages discussed here)).[11] That seven jurors here changed their vote also evidences the direct and rational connection. Marino, supra, 812 F.2d at 506.

2. Biblical Tenets Comprise "Strong Medicine"

In Sandoval, this Court found the argument paraphrasing Romans 13:1-5 was "strong medicine" because the "message was clear: those who have opposed the ordinance of God should fear the sword-bearing state, whose task, as an avenging minister of God, is to bring wrath upon those who, like Sandoval, practice evil." 241 F.3d at 778.

The nature of extrinsic matter and whether it is "inflammatory" is a key factor in determining prejudice (Jeffries, supra, 5 F.3d at 1190) but the opinion fails to consider that the Biblical verses are "strong medicine" and all the foreman's Biblical cites "supported the imposition of the ultimate penalty." ER 226 at 15-16; Fields at 1207 n.12.

D. The Opinion Misapprehends the Supreme Court's Prejudice Test

The opinion states that the aggravating evidence was "powerful" and that trial counsel made "a forceful case for mitigation" in his closing argument. Fields at 1210. Counsel presented no mitigating evidence and his closing thus lacked

---

[11] Accord, State v. Harrington, 627 S.W.2d 345, 350 (Tenn. 1981) (error where jury foreman "buttressed his argument for imposition of the death penalty by reading the jury selected biblical passages"); Harlan, supra, 109 P.3d at 631 (reliance upon Biblical verses unconstitutionally relieves a juror of individual responsibility for death verdict).

evidentiary support. But whether there was powerful aggravating evidence and a strong closing argument is not the issue for prejudice.

The jury misconduct here constituted structural error.[12] But if prejudice is required, relief is warranted where the error had a "substantial and injurious effect or influence" on the verdict, or if there is "grave doubt" on this question. Brecht, supra, 507 U.S. at 623; O'Neal v. McAninch, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The inquiry is not "whether there was enough to support the result," apart from the error, but "rather, even so, whether the error itself has substantial influence." O'Neal, 513 U.S. at 437-38, quoting Kotteakos v. United States, 328 U.S. 750, 764-66, S.Ct. 1239, 90 L.Ed. 1557 (1946). A court should not "speculate upon probable reconviction" or whether the jury was right regardless of the error. Kotteakos, 328 U.S. at 763-64.

The opinion, however, speculates both that the "jury was right" and that it would have returned a death verdict because of "powerful" aggravating evidence to "support that result, apart from the error," and counsel's argument did not sway the jury. But the opinion does not evaluate the impact of the extrinsic materials.

It was only after consideration of the notes that seven jurors who had voted for life on the second day of deliberations changed their vote. ER 226 at 17.

---

[12] United States v. Noushfar, 78 F.3d 1442, 1444-46 (9th Cir. 1996) (structural error where jury received extrinsic audiotapes); Mach v. Stewart, 137 F.3d 630, 633-34 (9th Cir. 1997) (exposure to extraneous information "arguably rises to the level of structural error"). Alternatively, there was "a deliberate and especially egregious error of the trial type" that so contaminated "the integrity of the proceeding" so as to warrant relief absent a showing of prejudice. Brecht v. Abrahamson, 507 U.S. 619, 638 n.9, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

This evidence demonstrates prejudice. E.g., Marino, supra, 812 F.2d at 505-06 (prejudice where holdout juror changed his vote after receiving dictionary definition of "malice"); Mattox, supra, 146 U.S. at 150 (murder conviction reversed where jury was undecided as of morning of second day of deliberations, at which time they considered newspaper article about the case and verdict was then reached); Sandoval, 241 F.3d at 779 (prosecutor's argument prejudicial where jury was split after three days of deliberations); Romine v. Head, 253 F.3d 1349, 1370-71 (11th Cir. 2001) (prosecutor's argument that death penalty complies with the will of God prevents individualized sentencing decision and was prejudicial where jury was initially split over penalty).

III. THE OPINION APPLIES THE WRONG LEGAL STANDARDS TO THE BIAS CLAIM

A. Additional Facts

1. The Attack's Effect on the Hilliards

The attack on Ms. Hilliard was the most horrifying experience of her life. She required medical care for "at least three to four months" and lived in terror that her assailant would return to "finish her off." Only after the Hilliards moved to Anaheim--after Petitioner's trial--did her fears begin to subside. ER 351 at 31:14-16, 36:22-37:5, 38:2-9, 62:9-12.

When Hilliard arrived at the hospital he saw that his wife had a broken nose, black eyes, and head lacerations. She told him the details of the attack, and that her assailant was a young African-American who had stolen her purse containing their home address and threatened to return to finish her off. ER 352 at 15:3-

16:19, 17:17-22.

The attack was "very very upsetting" to Hilliard. He changed the locks on their home and sat up every night holding a loaded shotgun. If the rapist returned, he would use the shotgun to "take care of the situation." Id. at 19:13-21:17, 32:2-5.

2. Hilliard Did Not Disclose Material Facts at Voir Dire

After hearing the charges, Hilliard assumed he would not be selected because of the crimes against his wife. ER 352 at 24:12-23. He claims he had "misgivings" about serving on Petitioner's jury, did not want to serve, and hoped to be disqualified. Id. at 38:12-39:2. Yet, he never disclosed any of these sentiments. As to the attack, he stated only that his wife "was assaulted and beaten, robbed, two years ago Christmas." ER 256, Ex. 21 at 173-74. Hilliard did not disclose his wife had been raped and kidnapped, although he knew the meaning of these terms. He understood his response left the trial court unaware of the rape and kidnap. ER 352 at 29:7-13, 30:1-9, 33:10-14, 82:21-25.

Based on Hilliard's response, the trial judge stated: "Some of the charges involved in this case are robberies. Do you think that is going to make it difficult for you to be a fair, impartial juror . . . as a result of the experience your wife went through?" Hilliard responded, "I doubt it. I think I'd base it strictly on the charges and the evidence that's presented." ER 256, Ex. 21 at 174.

He equivocated because, he testified, "You can never be sure what's in the back of your mind." Id. at 31:17-22. Hilliard similarly admitted he "tried to remain as objective **as possible**" but that "some type of psychological evaluation"

may have indicated to the contrary. Id. at 36:25-37:3-6 (emph. added). Petitioner's counsel nonetheless accepted Hilliard without questioning him. Fields at 1199.

B. The Opinion Fails to Apply the Mattox Presumption

The opinion holds Hilliard was a constitutionally sufficient juror because the District Court concluded he "did not buy" his wife's "speculation" that Petitioner was her assailant, and their discussions did not affect his impartiality. Fields at 1199. The opinion, however, does not apply the Mattox presumption. As this Court explained in Caliendo, 365 F.3d at 696-97:

> "We and other circuits have held that Mattox established a bright-line rule: Any unauthorized communication [involving a juror] is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing. . . . The Mattox rule . . . protects and safeguards defendants' Sixth Amendment rights to a fair trial . . . [and] applies when an unauthorized communication with a juror crosses a low threshold to create the potential for prejudice." (Citations omitted.)

In Caliendo, the presumption triggered when a detective who testified at trial engaged in small talk with three jurors for twenty minutes in a courtroom hallway. Id. at 693, 697; accord, United States v. Williams, 822 F.2d 1174, 1188 (D.C. Cir. 1987) (presumption applies to "banter").

The District Court also failed to apply this presumption (ER 275 at 47-49) and thus the opinion errs by relying on it here. Caliendo, 365 F.3d at 694, 698 (disregarding findings that jurors were not actually influenced by their

conversations with the detective--after an evidentiary hearing at which the jurors testified--because the Mattox presumption was not applied).

The opinion's analysis misapprehends the law because in light of the Mattox presumption Petitioner need not prove anything beyond that the conversations occurred--let alone that Hilliard "bought" that Petitioner was his wife's assailant. But in any event the evidence on this point is that Hilliard at least seriously entertained that notion. He refused to let his wife attend trial specifically because he did not want to lose his seat if she identified Petitioner. ER 352 at 56:9-57:5; 60:2-15. That Hilliard even entertained the notion that Petitioner could be his wife's assailant, alone, contaminated him as a juror.

Moreover, even without Mattox, Hilliard was in a constitutionally untenable position regardless of whether *he* believed Petitioner was the assailant because he knew his wife believed it. Hilliard could thus not be "indifferent." He knew if he voted to acquit Petitioner his wife would be terribly upset and fearful, and he would have to live somehow with the unbearable consequences if she turned out to be correct and Petitioner then returned to "finish her off." Remmer v. United States, 350 U.S. 377, 381, 76 S.Ct. 425, 100 L.Ed 435 (1956) (vacating conviction where improper contact affected juror's "freedom of action as a juror").

A key factor to consider in determining if the government carried its "strong burden" of rebutting the presumption, is the "length and nature of the contact." Caliendo, supra, 365 F.3d at 697-98. The Hilliards discussed Ms. Hilliard's suspicions *every night* and it is hard to imagine what could be more prejudicial

than a juror being told repeatedly the defendant might be responsible for a prior heinous attack on his wife. See, Fullwood v. Lee, 290 F.3d 663, 681-82 (4th Cir. 2002) (allegations that juror was pressured by her husband to impose death sentence called into question the integrity of the verdict). These discussions impacted Hilliard, another factor. Caliendo, 365 F.3d at 697; United States v. Rutherford, 371 F.3d 634, 643 (9th Cir. 2004) (prejudice where communications distract the juror from the evidence). Finally, no curative instruction was (or could have been) given. Caliendo, 365 F.3d at 697-98.

C. The Panel Opinion Applies the Wrong Tests for Implied Bias

Bias may be implied "'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial . . . under the circumstances.'" Fields at 1194, citing, Tinsley v. Borg, 895 F.2d 520, 527-28 (9th Cir. 1990) (bias can be implied when close relatives have been involved in a situation similar to that at trial); accord, United States v. Eubanks, 591 F.2d 513, 516 (9th Cir. 1979) (implying bias where sons of juror on heroin distribution case were heroin users). Bias should be implied "where the juror . . . has had some personal experience that is similar or identical to the fact pattern at issue in the trial," or there is a potential for substantial emotional involvement adversely affecting impartiality. Gonzalez, supra, 214 F.3d at 1112, 1114 (implying bias in cocaine distribution case to juror who disclosed that her ex-husband had used and dealt cocaine during their

marriage, based on equivocation during voir dire "and the similarity between her traumatic familial experience and the defendant's alleged conduct"). [13]

The opinion applies the wrong standards to the implied bias claim. First, the opinion relies on a finding that Hilliard was not actually biased by the conversations (Fields at 1197-98)--based on Hilliard's say-so in a selected portion of Hilliard's deposition--but the conversations are not the only basis for implying bias here and, as noted, the test for implied bias is objective and it does not matter if Hilliard says or believes that he was impartial.

Second, the opinion sees no reason to imply bias "solely because Hilliard was the spouse of a rape victim." Fields at 1197. Petitioner never contended Hilliard was biased *solely* for that reason. Bias should be implied here due to: the similarities of the crimes and Petitioner's resemblance to Ms. Hilliard's unidentified assailant, Hilliard's omissions on voir dire, the Hilliards' conversations, and/or Hilliard's refusal to jeopardize his seat on the jury.

Third, Petitioner need not prove that "everyone in Hilliard's position" would be biased. Fields at 1198. The standard is whether the average person would be.

Under the pertinent standards, Hilliard was impliedly biased--even apart from his conversations with his wife and omissions on voir dire. First, he endured a personal experience "similar to" the fact pattern at trial. To state that "was on account of his wife's experiences, not his own," (Fields at 1197) ignores Hilliard's

[13] Bias can be implied if a juror is dishonest during voir dire (Fields I, 309 F.3d at 1104), or where "the juror is apprised of . . . prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states he will." Tinsley, 895 F.2d at 528.

anguish from the attack on his wife and the precedent that implied bias can arise from crimes against a family member.

Second, it is "highly unlikely that the average person could remain impartial" if asked to judge a defendant accused of crimes so similar to recent and unsolved crimes against the person's wife, especially knowing the juror's wife suspects the defendant is her assailant.

Third, not only was there a "potential for substantial emotional involvement," but there was actual emotional involvement here. Every day Hilliard sat as a juror, with misgivings, as the evidence triggered memories of the unsolved attack against his wife. Then every night she asked him to go to trial to see if Petitioner was her assailant but he denied her requests because he was determined not to "compromise" his seat.

Fourth, by his material concealments during voir dire, which secured his place on the jury, and his refusal to let his wife attend trial, which protected that place--Hilliard displayed an "excess of zeal" which "introduces the kind of unpredictable factor . . . that the doctrine of implied bias is meant to keep out." Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998). Even if Hilliard did not believe that Petitioner was his wife's rapist, his zeal to serve may have been motivated by a desire "to avenge past wrongs." Dyer, 151 F.3d at 981-82.

The opinion seeks to distinguish implied bias cases on the basis the jurors had "not been forthcoming" in voir dire (Fields at 1197), but neither was Hilliard. Fields I, 309 F.3d at 1104 (Hilliard's response was not "completely

forthcoming"). And implied bias does not require dishonesty during voir dire, as referenced above. Accord, Coughlin v. Tailhook Association, 112 F.3d 1052, 1062 (9th Cir. 1997) ("[e]ven where a juror's answers are entirely honest . . . a new trial may be warranted under an 'implied bias' theory"); Gonzalez, supra, 214 F.3d at 1112 (implying bias even though juror was forthcoming on voir dire, noting that "unlike the inquiry for actual bias, in which we examine the juror's answers on voir dire for evidence that she was . . . partial, the issue for implied bias" is whether the average person in the juror's position would be biased); United States v. Allsup, 566 F.2d 68, 71-72 (9th Cir. 1977) (bias implied to jurors who disclosed they were tellers at a branch of a bank robbed by defendants); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556-57, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (implied bias may exist "regardless of" whether a juror is dishonest) (JJ. Blackmun, Stevens, and O'Connor concurring); id. at 558-59 (whether juror was honest is "simply" a factor) (JJ. Brennan and Marshall concurring). [14]

Finally, the "personal considerations" identified in the opinion as relevant are all present here. Fields at 1198. There is no disputing the "similarity of the spouse's experience to the facts of the case," the horrific "nature of the experience," or that its impacts on the Hillards were "contemporaneous and continuing." Fields at 1198. As to how juror Hilliard "handled it," he sat guard

[14] The opinion seeks to distinguish Allsup based on the jurors' "direct relationship with a victim [the bank]" and personal "vulnerability to the type of conduct for which the bank robbers were on trial." Fields at 1197. But implied bias is not limited to cases where the juror has a relationship with the victim at trial. E.g., Gonzalez, Dyer, and Eubanks. And Hilliard, like the jurors in Allsup, was vulnerable to future crime based on the threat made to his wife.

with a shotgun, concealed material facts during voir dire, repeatedly discussed the case with his wife and her suspicions, and refused to jeopardize his seat.

D. McDonough Styled Bias Is Also Present

Voir dire protects the right to impartial juries but "truthful answers" are necessary for it to work. McDonough, supra, 464 U.S. at 554. Hilliard was not "completely forthcoming" on voir dire. Fields I, 309 F.3d at 1104. He did not disclose his misgivings about serving and while he understood he was to disclose crimes against family members--and listened while potential jurors questioned before him did so and were then asked about their impartiality (ER 352 at 28:20-29:6; ER 256, Ex. 21 at 159:15-161:21 and 171:1-172:3)--he did not disclose the rape and kidnap crimes, thus misleading the trial judge. His silence suggests "an unwillingness to be forthcoming" and his answers were "misleading as a matter of fact." Williams, supra, 529 U.S. 420-22.[15]

IV. PETITIONER WAS PREJUDICED BY THE "ABSENCE OF PENALTY PHASE INVESTIGATION"

A. Counsel Failed to Investigate and Present Mitigating Evidence

This was counsel's first capital case. Fields at 1199. He spent *four hours* out of court preparing for penalty phase, and "did not conduct any investigation of defendant's . . . background," or interview family members for mitigating evidence. 2000 ER 293 at 1-5; In re Fields, 51 Cal.3d 1063, 1076 (1990); ER 285 at 15 n.14.

[15] Hilliard could have disclosed the material facts in response the general question about jurors being a witness to crimes or "involved in" criminal charges, the follow-up question directed to him, and general question regarding whether anyone knew of any reason he could not serve as a fair or impartial juror. Fields I, 309 F.3d at 1101 n.3.

The penalty phase lasted a half-day. 2000 ER 291 at 480. Counsel waived opening statement. The prosecutor gave an opening statement, called a police officer who testified about Petitioner's manslaughter conviction, and introduced evidence of the manslaughter victim's head wounds. Fields at 1200; 2000 ER 290 at 1556-67; 2000 ER 291 at 480. Counsel did not cross-examine the officer, including as to the circumstances of the manslaughter--which involved a sexual attack on Petitioner. 2000 ER 290 at 1567. Counsel did not offer any evidence or witnesses. Id.

Counsel considered only three potential witnesses: Petitioner's mother, father, and sister Gail, but did not even bother to interview them. 2000 ER 294 at 8-9; 2000 ER 292 at 4. A plea of mercy from Gail especially--who was a critical witness for the state at guilt phase--could have resonated with the jury that had already found her credible.[16]

Counsel's failure to investigate renders his "decision" to pursue an alternative "strategy"--arguing Petitioner had nobody "to guide or support him" (Fields at 1202)--constitutionally infirm. Wiggins v. Smith, 539 U.S. 510, 521-25, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). An investigation would have uncovered the true facts of Petitioner's "undoubtedly grim" childhood (Fields at 1204), and other mitigating evidence, including:

---

[16] Numerous other available family members and witnesses, never contacted by counsel, could also have testified. Counsel knew several of Petitioner's family members lived in Los Angeles and there is a reference to Petitioner's then wife in Petitioner's manslaughter probation report. ER 170 at Ex. 30 at 2.

1. Counsel's argument that Petitioner has a father "who he's never known" (2000 ER 290 at 1586) was wrong. Petitioner's father is "a sick and violent alcoholic who loved to beat women and children." ER 106; Ex. 6, ¶ 12. He singled Petitioner out for the most severe beatings, including with belts and sticks from the time Petitioner was an infant, often for no reason. By the time Petitioner was nine, his father would beat him with his fists and kick him after knocking Petitioner down. Petitioner would cry out "why are you hitting me," but the beating would continue. 2000 ER 171 at 56; ER 106 at Exs. 4, 5, 6, 16.

2. Petitioner's home was roach infested and smelled of urine. When home, Petitioner's mother generally drank and slept. She encouraged Petitioner to steal for the family and it was only when he did so that she praised him. 2000 ER 171 at 55-60; ER 106 at Exs. 3, 4, 16, 20, 23.

3. When Petitioner was eleven, his parents abandoned him to the care of his great-uncle, a known pedophile in Texas. During the next six months, the great-uncle regularly abused Petitioner, including sodomizing him--causing him to scream out in pain. ER 106 at Exs. 3, 4, 6 (¶¶ 38-47), 9.

4. Petitioner's parents knew of this abuse but refused to rescue him. Finally, another relative took Petitioner home. There, relatives noticed a marked change in him and he began to exhibit emotional distress, for which his mother refused to get help. 2000 ER 171 at 60-61; ER 106 at Exs. 6 (¶¶ 38-47), 8, 9, 10.

5. Despite these horrors, Petitioner was a likeable child. He enjoyed making people laugh, walked his younger siblings to school, and helped his older brother with his paper route. 2000 ER 171 at 63; ER 106 at Exs. 4, 5, 6, 10, 19, 20.

6. Petitioner married in Los Angeles. He was caring and never violent toward his wife. He often drove her to Riverside so she could tend to her ill grandmother. Petitioner's trial counsel never contacted her (ER 170 at 27-29), instead arguing that he could not call a wife "to explain . . . why her husband should not be killed" because "Stevie is single." 2000 ER 290 at 1586.[17]

B. The Opinion Fails to Evaluate the Available Mitigating Evidence

The opinion analyzes the evidence offered in the initial state habeas proceedings (e.g., Fields at 1199-1205) but fails to consider the mitigating evidence that was available. Fields at 1203 n 8, citing Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). The issue in Tamayo-Reyes was what standard applied to a request for evidentiary hearing where the petitioner failed to develop facts in state court. Tamayo-Reyes, 504 U.S. at 5. That is not the issue here and Petitioner presented all the facts in state court. His exhaustion petition was denied. Fields v. Calderon, 125 F.3d 757, 759 (9th 1997); ER 250. The operative petition and declarations then filed below are virtually identical to the exhaustion filing. 2000 ER 171 at 7.

Tamayo-Reyes does not prevent a federal court from considering evidence actually presented in state court and a state prisoner can rely on the state record.

[17] The foregoing is just an overview of the available mitigating evidence. 2000 ER 171 at 51-66 and 22 mitigating declarations attached to ER 106 and ER 170.

Townsend v. Sain, 372 U.S. 293, 322, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Williams v. Taylor, 529 U.S. 362, 396-97, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (courts must "evaluate the totality of the available mitigation evidence").

Petitioner is entitled to rely on the 22 declarations he submitted containing available mitigating evidence (exhibits to ER 106 and 170) and have them accorded "appropriate weight." Williams, supra, 529 U.S. at 398.[18]

C. The Panel Opinion Fails to Consider the "Powerful" Nature of the Mitigating Evidence and the Pro-life Vote

The opinion fails to recognize that the mitigating evidence here has been recognized as powerful. E.g., Wiggins, supra, 539 U.S. at 533 (evidence of "repeated sexual abuse" is "powerful"); Stankewitz v. Woodford, 365 F.3d 706, 723 (9th Cir. 2004) (society has long believed that criminals from disadvantaged background may be less culpable).

The opinion instead emphasizes the "powerful" aggravating factors. Fields at 1202-05. But the mitigating evidence here would have rebutted the aggravating evidence at the penalty phase: the manslaughter Petitioner committed in response to a sexual attack by an older man described by police as a "pretty strong dude." ER 170 at 86. Moreover, in Wiggins and Williams, the Supreme Court made "clear that the presentation of mitigating evidence is vital" even where

[18] While "state findings of fact made in . . . deciding an ineffectiveness claim are subject to the deference requirement of [former 28 U.S.C. § 2254(d)]," the "performance and prejudice components" both present mixed questions of law and fact to which deference is not owed. Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Birtle, 792 F.2d 846, 847 (9th Cir. 1986). The only fact-findings to which deference is owed were those made by the referee. ER 285 at 15; In Re Fields, supra, 51 Cal.3d at 1068-69.

aggravating evidence is powerful and that "a failure to present mitigating evidence can be prejudicial even where" the crimes are egregious. Stankewitz, supra, 365 F.3d at 714; Smith v. Stewart, 189 F.3d 1004, 1011-12 (9th Cir. 1999) (where the crimes are "heinous" counsel must present the strongest case possible in mitigation); Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992) (defendant who murdered 13 people entitled to relief).

The opinion does not consider that: 1) counsel's failings allowed the prosecutor to argue there are no mitigating facts (Fields at 1204 n.9), 2) the jury nonetheless spent two days deliberating, 3) seven jurors voted for life on the final day, and 4) cases finding prejudice on similar facts. E.g., Bean v. Calderon, 163 F.3d 1073, 1080-81 (9th Cir. 1998) (prejudice where defense experts were unprepared and mitigating factors reported in vague terms, where "jury was initially divided over" the death penalty; it was thus "reasonably likely" the jury would not have voted for death had the penalty presentation been stronger); Clabourne v. Lewis, 64 F.3d 1373, 1377, 1384-87 (9th Cir. 1995) (death sentence reversed where sentencing decision had been "close"); Mayfield v. Woodford, 270 F.3d 915, 929 (9th Cir. 2001) (prejudice despite "strong" aggravating evidence where jurors deliberated a day and a half and were initially split); Stankewitz, 365 F.3d at 725 (prejudice where several jurors initially supported life); Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) (prejudice where prosecutor argued lack of mitigation and some jurors initially favored life); Karis v. Calderon, 283 F.3d

1117, 1140 (9th Cir. 2002) (prosecutor stressed absence of mitigating evidence due to counsel's failure to present evidence of abusive childhood).[19]

V. CONCLUSION

The jury's reliance on religious scriptures and dictionary definitions, and trial counsel's failure to investigate and present mitigating evidence, contaminated the penalty phase. Hilliard's presence contaminated the guilt phase. The panel opinion, however, ignores, misapprehends, and departs from established precedent protecting the fundamental rights at issue. Rehearing should be granted.

Dated: February 14, 2006

Kulik, Gottesman, Mouton & Siegel
By: _____
David S. Olson
Attorneys for Petitioner

[19] Under Bean, it is not sufficient the jury "already knew something" of Petitioner's background. Fields at 1204. Accord, Stankewitz, 365 F.3d at 724 (defendant's background introduced in a cursory manner); Rompilla v. Beard, 125 S.Ct. 2456, 2459, 2469, 162 L.Ed.2d 360 (2005) (prejudice notwithstanding "naked pleas" for mercy from family members). And counsel's insanity defense was neither viable as a matter of law (Fields at 1200 n.7) nor reflective of Petitioner's true deficits. ER 170 at 31-34 (prior opinions based on "dearth of materials and information made available;" Petitioner has "neurological impairment" and "organic brain damage").

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the foregoing petition for panel rehearing with suggestion for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 8,036 words, exclusive of the cover page, tables of contents and authorities, and certificates of compliance and service, based on the word count of the word-processing system used to prepare the petition.

By its orders of December 19, 2005, and January 17, 2006, the Court granted Fields permission to file a petition not to exceed 30 pages. The petition thus complies with the "alternative length limitations" referenced in Circuit Rules 40-1 and 32-3.

Dated: Feb. 14, 2006

Respectfully Submitted,

KULIK, GOTTESMAN, MOUTON & SIEGEL, LLP

By: _____
David S. Olson
Attorneys for Petitioner-Appellant/Cross-Appellee, Stevie Lamar Fields

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Kulik, Gottesman Mouton & Siegel, LLP, Comerica Bank Building, 15303 Ventura Boulevard, Suite 1400, Sherman Oaks, California 91403.

On February 14, 2006, I served the foregoing document(s) described as **PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC** on the interested parties in this action addressed as follows:

Kristofer Jorstad, Esq.
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013
Tel.: (213) 897-2275

☒ By placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above.

☐ **BY PERSONAL SERVICE (CCP §1011)**: I caused such envelope(s) to be personally served to the addressee(s) as stated above.

☐ **BY MAIL (CCP §1013(a)& (b))**: I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the U.S. Postal Service. Under that practice such envelope(s) is deposited with the U.S. postal service on the same day this declaration was executed, with postage thereon fully prepaid at 15303 Ventura Boulevard, Suite 1400, Sherman Oaks, California, in the ordinary course of business.

☒ **BY FEDERAL EXPRESS (CCP §1013(c)&(d))**: I am readily familiar with the firm's practice of collection and processing items for delivery with Overnight Delivery. Under that practice such envelope(s) is deposited at a facility regularly maintained by Overnight Delivery or delivered to an authorized courier or driver authorized by Overnight Delivery to receive such envelope(s), on the same day this declaration was executed, with delivery fees fully provided for at 15303 Ventura Boulevard, Suite 1400, Sherman Oaks, California, in the ordinary course of business.

☐ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on February 14, 2006, at Sherman Oaks, California.

Jennifer Daniello

PROOF OF SERVICE

Docket Nos. 00-99005 and 00-99006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS, Petitioner/Appellant, vs. STEVEN ORNOSKI, Warden, Respondent/Appellee.	D.C. No. CV-92-00465-DT DEATH PENALTY CASE AMICUS BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appeal from The United States District Court
For the Central District Of California,
Dickran M. Tevrizian, District, Judge, Presiding

JOHN T. PHILIPSBORN
CA Bar No. 83944
California Attorneys for Criminal Justice
507 Polk Street, Suite 250
San Francisco, CA 94102
Tel.: (415) 771-3801
Fax: (415) 771-3218

Attorney For Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Rules

Other Authorities

Docket Nos. 00-99005 and 00-99006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS, Petitioner/Appellant, vs. STEVEN ORNOSKI, Warden, Respondent/Appellee.	D.C. No. CV-92-00465-DT DEATH PENALTY CASE AMICUS BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

California Attorneys for Criminal Justice ("CACJ") submits this brief amicus curiae in support of the Appellant's Petition for Rehearing filed by Petitioner/Appellant STEVIE L. FIELDS, pursuant to F.R.A.P., rule 29(a). Appellant seeks rehearing of this Court's decision, filed December 8, 2005. (Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005).)

SOURCE OF AUTHORITY TO FILE THIS BRIEF

Pursuant to F.R.A.P., rule 29(a), counsel for appellant has granted consent, and counsel for appellee has taken no position, regarding the filing of this brief, as described in a confirming letter, which is being lodged with the Clerk concurrently with the submission of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

CACJ is a non-profit corporation which was formed to achieve certain objectives, including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." Article IV, By-Laws of CACJ. The organization has approximately 2,000 dues-paying members, primarily criminal defense lawyers employed in both the public and private sectors practicing before the state and federal courts throughout California. CACJ often appears before this Court as amicus curiae on matters of importance to its membership.

CACJ has an interest in ensuring that defendants in capital prosecutions receive fair trials, and that death judgments imposed against such defendants are the product of procedures designed to produce reliable sentencing results. Ever since the decision of the California Supreme Court in People v. Sandoval, 4 Cal.4th 155 (1992), that reliability has been enhanced by the prohibition against the substitution or superimposition of religious standards for capital decision-making, in derogation of California's capital sentencing law. That salutary result is now threatened by the panel decision in this case, which untenably distinguishes

---

1 The undersigned, as co-chair of the amicus committee of CACJ, certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief.

the holdings of People v. Sandoval, supra, and the subsequent decision of this Court in Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2001), on the ground that in Fields religious law was interjected into the deliberations by a juror rather than the prosecutor. CACJ is concerned that if the decision in Fields is allowed to stand, it will undermine the laws of California and produce a substantial number of unreliable death judgments driven by those jurors who happen to have the most fervently held religious views. Furthermore, as will be explained below, the decision in Fields is at tension with the recent decision of the United States Supreme Court in Brown v. Sanders, ___ U.S. ___, 126 S.Ct. 884 (January 11, 2006), filed after the panel's decision.

CACJ is also concerned about the quality of representation provided by the lawyers appointed to represent defendants in capital prosecutions. Inadequate representation greatly increases the likelihood that a defendant will receive a death sentence. The representation provided to Mr. Fields in this case was grossly inadequate, and well below the minimum standards of competent representation articulated by the United States Supreme Court in Williams (Terry) v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000) and Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003). The Court's opinion in this case, if upheld, stands to lower the bar for representation in capital cases and undermine the clarity of the pertinent legal standards in this circuit.

Accordingly, amicus curiae CACJ asks leave to file this brief, and urges the Court to grant rehearing to consider further these important issues.

1. THE OPINION AUTHORIZES JURORS TO DISCARD STATE LAW CRITERIA GOVERNING CAPITAL SENTENCING IN FAVOR OF IMPERMISSIBLE RELIGIOUS, POLITICAL, OR OTHER CRITERIA THAT ONE OR MORE JURORS CAN PERSUADE THE OTHER JURORS TO FOLLOW IN MAKING THEIR PENALTY DECISION

Arguing "an eye for an eye" to jurors used to be a favorite prosecutorial gambit in penalty phase argument in capital trials. However, starting with People v. Sandoval, 4 Cal.4th 155 (1992), a whole line of California and federal cases have made clear that such argument is not permissible.

At the same time, some jurors thought Biblical mandates would be more persuasive to their fellow jurors than California law. They brought in passages from the Bible to persuade those inclined to vote for life without parole to give death instead. Relying on the principle articulated in Sandoval, supra, at 194, that "The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority," a series of parallel cases made clear that this practice too was impermissible. (See People v. Mincey, 2 Cal.4th 408, 465-467 (1992); People v. Danks, 32 Cal.4th 269, 308 (2004).) As a result, California Attorneys General largely conceded the point. (See, e.g., People v. Bob Russell Williams, No. S056391, Respondent's Brief, p. 147: "Juror No.

61055's conduct in bringing in passages from the Bible and reading them aloud was misconduct.") Instead, the battleground in post-conviction litigation shifted to whether or not the misconduct was prejudicial.

In Fields, the jurors began their penalty phase deliberations at 2:00 p.m. on July 16, 1979. They adjourned at 4:00 p.m. That evening Foreperson White checked the Bible and other reference texts, including a dictionary, and made notes purporting to represent the Bible's positions "for" and "against" the death penalty. When the jury reconvened the following morning, Foreperson White brought his notes to the deliberations. By 3:00 p.m. that day, presumably after a break for lunch, the jury had reached a verdict of death.

Despite these actions, which appear to constitute clear misconduct, the panel opinion equivocates on whether what occurred here was permissible ("Whether or not White should have brought his notes to the jury room and shared them . . .," Slip Opinion, p. 16002), and then concludes that petitioner was not prejudiced by whatever did occur. It comes to this conclusion by adopting several approaches, none of which withstands analysis.

First, it takes issue with the district court's conclusion that the Biblical verses were "extrinsic, factual material" (Slip Opinion, p. 16000.), concluding that "they are not, in fact, facts at all." (Id. at 16001.) But even if they are not, that does not make reliance on them permissible. In fact, reliance on Scripture is far

worse than reliance on extraneous facts. Scripture provide an entirely different framework for deciding the case, not the laws of California on which the jury was instructed.

It is instructive to consider what jurors are told at the beginning of a typical trial in California:

> Members of the Jury: You have been selected and sworn as jurors. I shall now instruct you as to your basic functions, duties and conduct. At the conclusion of the case, I will give you further instructions on the law. . . .
>
> You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. . . . .You must not independently investigate the facts or the law . . . . (CALJIC 0.50.)
>
> " . . . now it is my duty to instruct you on the law that applies to this case. . . *You must base your decision on the facts and the law. . . you must accept and follow the law as I state it to you, regardless of whether you agree with it.* If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. (CALJIC 1.00)
>
> "You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information. (CALJIC 1.03) (October 2005 Edition, emphasis supplied.)

The jury in Fields was similarly instructed.

Not only is Biblical law different authority, but it is widely viewed as higher authority. Thus it would be very tempting for jurors to succumb to the invitation to rely on it, rather than the court's instructions, to decide penalty.

The panel's decision in Fields is at odds with the recent decision of the United States Supreme Court in Brown v. Sanders , ___ U.S. ___, 126 S.Ct. 884 (January 11, 2006). In Sanders the High Court cut through the semantic distinctions between weighing and non-weighing states to focus on the reality of jury deliberations on penalty, concluding: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (Slip Op., 8.) The Court quoted its previous decision in Stringer v. Black, 503 U.S. 222, 232, 112 S.Ct. 1130 (1992), that "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."

Here, the jury was supposed to decide penalty according to the scales established by the laws of California and provided to the jury through CALJIC (the standard jury instructions given throughout California at the time), and not according to the Law of Moses, the teachings of Jesus Christ or any other moral or

religious authority, no matter how venerable or unimpeachable as a source of religious guidance. Whether the error resulted from prosecutorial misconduct or juror misconduct, the effect of the error was the same: an impermissible factor was introduced into the jury's deliberations. As the Sanders court explained, " . . . skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (Slip Op., 9.) In Fields, but for this erroneous factor the jury would have had no legitimate avenue for considering Biblical law in its decision-making. In Sanders the High Court focused on substance and concluded that the impact of the superfluous factor was "inconsequential." Here the nature of the improper factor, and the dramatic role it played in changing a jury that was leaning toward LWOP to a jury that returned a verdict of death, make clear that it was not inconsequential.

Ironically, if the Biblical edict of "an eye for an eye" were the law in California, it clearly would be unconstitutional. There are over 2,000 homicides annually in California. If everyone who killed were subject to execution, there would be no narrowing function played by the statutory special circumstances, many more homicide defendants would be capitally charged, and California's statute would not pass constitutional muster under decisions such as Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988) that require narrowing. In this case

Foreperson White provided his fellow jurors not only with the Biblical commandment of "an eye for an eye," but also with Romans 13:1-5, which is even more punitive in its message.

Second, the panel purports to distinguish juror misconduct during deliberations from prosecutorial misconduct in argument on the untenable ground that "what may be improper or prejudicial when said by a prosecutor may not be so when said by a juror." (Slip Op., p. 16001-02.) This general observation is irrelevant to the issue presented in this case. Certainly a prosecutor may not vouch for the credibility of a witness in argument, whereas jurors may express complete confidence in the credibility of a particular witness in their role as fact-finders. What is crucial here is that no one, not the court through its instructions, nor the prosecutor in argument, nor a juror in deliberations may superimpose a decision-making standard that supplants state law.

Moreover, juror invocation of an improper standard is *more* pernicious than prosecutorial misconduct, for a number of reasons. At least prosecutorial misconduct is subject to objection by defense counsel, and to corrective instruction from the court. (See Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 1200 (1990) (arguments of counsel that misstate the law are subject to objection and correction by the court). Juror misconduct, however, is often undetected, and therefore cannot be timely corrected. Not only should the jurors not be relying on

Scripture, but they may, as in this case, be relying on highly selective, isolated verses that were taken out of context and given meaning contrary to that which most religious leaders would accept.

Third, the opinion deems use of Biblical verses acceptable because they are "common knowledge" that are part of jurors' "life experiences." (Slip Opinion, p. 16000.) The incorrectness of this assumption is shown by the record. Foreperson White did not rattle these passages off the top of his head. He had to do research in several texts, probably with the aid of a concordance, to find them, and then he had to instruct his fellow jurors, who were presumably ignorant of them, on their content and meaning.

In addition, even if some of the passages of the Old and New Testaments are generally familiar to the public, that does not cure the harm arising from the efforts of a jury foreperson to substitute Biblical standards for CALJIC standards. There are probably as many jurors who are familiar with the astrological charts in daily newspapers as are familiar with Biblical text, but that familiarity would not cure the harm in a case where the jury foreperson persuaded the jury to convict the defendant or sentence him to death based on an astrological reading during deliberations.

Fourth, the opinion fails to appreciate the role these Biblical edicts played in the jury's deliberations. It is obvious that the jury was uncertain as to the

appropriate penalty based on the CALJIC standards alone; otherwise, the foreperson's religious research efforts would have been unnecessary. Just as obviously, the foreperson believed that he and the other jurors needed a different standard to guide the jury because the CALJIC standard was not getting the job done. The district court found that the foreperson presented his religious research as an alternative body of law, to replace the body of law given by the court and to lead to the verdict he favored. These passages were simple, easy to understand, and easy to apply. They were an attractive substitute for struggling with the "reasoned moral response" required by California law, under which the jurors were required to weigh the aggravation and mitigation and determine whether the aggravation so substantially outweighed the mitigation that a death verdict was appropriate. That is a much more difficult, albeit essential, task than simply applying the unambiguous rule that if the defendant killed, or merely rejected God's authority, he too must be killed.

The timing of the jury's verdict makes clear that the introduction of the Biblical verses had the intended effect. The panel opinion minimizes that effect by noting that the verses were introduced early in the deliberations, so the jury had plenty of time to review the evidence and reflect on the appropriate penalty. (Slip Opinion, p. 16002.) But the sequence of events makes clear that the verdict was

returned within hours of the introduction of White's notes, and there is no basis for concluding that the notes did not influence the verdict.[2]

Fifth, relying on Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000).the opinion places the burden to show prejudice on the petitioner ("Nothing in the record indicates that the jurors did not follow the instructions on the law as given by the trial judge." Slip Opinion, p. 16002.), and requires him to meet the standard of Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).[3] However, in Caliendo v. Warden of Cal. Men's Colony, 365 F.3d 691, 697 (9th Cir. 2004), this Court, concerned about the prejudice to the fairness of the defendant's trial, relied on Mattox v. United States, 146 U.S. 140, 150 (1892), in which the United States Supreme Court held that juror misconduct must be presumed prejudicial, and granted relief for the failure to apply the presumption of prejudice. Given the severity of the misconduct that occurred in this case, far more serious and likely to affect the verdict than the limited conversation three jurors in Caliendo had with a law enforcement witness on matters unrelated to the trial, the burden should properly fall to the prosecution to establish that the misconduct was harmless, whether it is by showing that there is no reasonable possibility it affected the

---

2 Compare, People v. Danks, 32 Cal.4th 269 (2004) (fact that Biblical verses were introduced late in the jury's deliberations made it *less* likely that they were prejudicial to the defendant).

3 Sassounian involves the juror's improper receipt of extraneous evidence, not the receipt of an entirely different set of applicable law.

verdict, Caliendo, at 697, or that it did not have a substantial and injurious impact on the verdict. Brecht, supra. This burden it cannot meet, because there is no way to establish that the jury did not rely on Biblical law in reaching its verdict.

For the past three decades capital jurisprudence has focused on ensuring the reliability of death judgments. In Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 2635 (1994), the High Court, in reviewing the constitutionality of California's death penalty statute, emphasized that the process must be neutral and principled so as to guard against bias or caprice in the sentencing process. In Boyde v. California, supra, in holding that the standard of review is whether the jury has applied the challenged jury instructions in a way that prevents consideration of constitutionally relevant evidence, the High Court first noted that cases like Leary v. United States, 395 U.S. 6, 31-32 (1960) and Stromberg v. California, 283 U.S. 359 (1931) have made clear that where the jury may have convicted on an impermissible legal theory, the reviewing court must reverse and not speculate on whether the jury in fact relied on an impermissible ground. (Id. at 1197.) Nothing could be more unreliable than the possibility – which cannot be refuted – that the jurors in this case sentenced petitioner to death based on law other than the law of California. Where the jury may have based its verdict on

completely inapplicable law, not merely an impermissible legal theory, reversal is surely mandated.[4]

The Fields decision authorizes an unconstitutional jury reliance on religious or other decision-making standards that are inconsistent with California law. The bright-line distinction to be made here is that each individual juror may cast his penalty vote based on his ethical/religious/common sense background, and that juror's internal calculus is not subject to question or impeachment. In contrast, the Fields decision authorizes a group abandonment of the operative law in favor of whatever alternative rationale one or more jurors may promulgate, whether Judeo-Christian theology, astrology, or whatever "other–ology" is then in vogue.

2. THE OPINION ACCEPTS A LEVEL OF REPRESENTATION BY TRIAL COUNSEL THAT WAS BELOW CONSTITUTIONAL STANDARDS AND PREJUDICIAL TO THE DEFENDANT

This was trial counsel's first capital trial. He conducted virtually no investigation. He did not conduct any investigation in the Buffalo, New York area where defendant was raised, to speak with any of defendant's family, neighbors,

---

4 It is instructive to compare this Court's decision with the diametrically opposite conclusion reached recently by the Colorado Supreme Court in People v. Harlan, 109 P.3d 616, 633 (Colo. 2005) ("In a community where 'Holy Scripture' has factual and legal import for many citizens and the actual text introduced into the deliberations without authorization by the trial court plainly instructs mandatory imposition of the death penalty, contrary to state law, its use in the jury room prior to the penalty phase verdict was prejudicial . . . [we] conclude that there is a reasonable possibility that the extraneous biblical texts influenced the verdict to [defendant's] detriment."

teachers, etc., even though he acknowledged that he should have done so. (Slip Op., p. 15987.) (See, e.g., Rompilla v. Beard, ___ U.S. ___, 125 S.Ct. 2456 (2005), which notes that the impoverished environment in which defendant was raised was mitigating evidence that trial counsel should have investigated.) He did not hire a mitigation expert, despite his lack of experience. (See U.S. v. Kreutzer, 61 M.J. 293 (U.S.Ct.App. (Armed Forces) August 16, 2005) (retaining a mitigation expert is important where trial counsel lacks penalty phase experience).) He did not prepare a social history of the defendant. He presented no penalty phase evidence at all. The referee at the state evidentiary hearing found the representation was substandard. It is clear that this representation was shockingly below the standards set forth by the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition, 2003), and by the United States Supreme Court in Williams v. Taylor, supra, and Wiggins v. Smith, supra.

The panel gave several reasons for finding the representation adequate, none of which withstands analysis.

First, the panel minimizes the extent of the shortcomings of counsel. For example, it accepts counsel's explanation that he did not call defendant's mother and sister because they had received property from the defendant that they knew defendant had stolen. This explanation does not make much sense in the context of

defendant's trial. The jury independently learned that defendant's family had received stolen property from him. Petitioner's mother wore a victim's blouse to the preliminary hearing, and at trial the prosecution introduced testimony about this occurrence. Moreover, the point of calling defendant's mother and sister would not have been to show that they were saintly people, but rather to show the lack of stable moral guidance in defendant's upbringing. The fact that his caregivers exerted a corrupting influence on him was, in fact, mitigation. Moreover, it was entirely consistent with the available, but unused, mitigation theme that defendant's family *led* him into a life of crime. The opinion misses this key aspect of the evidentiary hearing. Although it notes that an early age defendant began stealing to please his mother and brought the proceeds to his parents (Slip Op., p. 15987), what it omits is that defendant began stealing *at the direction of* his mother. In other words, he did not choose a life of crime; rather, he was *led* into a life of crime by the person charged with his moral upbringing.[5]

The panel opinion fails to appreciate trial counsel's limited understanding of penalty phase mitigation. At the evidentiary hearing, counsel said he would not

---

5 Curiously, the opinion observes that the testimony of appellant's aunt, Alice Christopher, at the evidentiary hearing would not have been entirely sympathetic at trial, because, inter alia, appellant had been involved in at least one fight , when he was 16, **"during which he was stabbed in the neck."** (Slip Op., p. 15991, emphasis supplied.) It apparently assumes that appellant was responsible for this fight, rather than being the victim of an attack that reflects the dangerous environment in which he was raised.

have used the mitigating evidence that had been gathered by post-conviction counsel, because "it would have been ineffective." (Id. at 15988.) This statement betrays either counsel's ignorance of well-recognized mitigation, or his self-protective reasons for dismissing its value, or both. Since this was counsel's first capital trial, there is no valid reason to give deference to his purported justifications for doing nothing and then denigrating the efforts of other lawyers who did do something on appellant's behalf. His gratuitous comments against the interests of his former client reflect his hostile attitude toward the post-conviction litigation directed at revealing his ineffective representation.[6]

The panel opinion also improperly limits the record of available mitigation before the state and federal courts, all of which must be considered in assessing both the inadequacy of counsel's performance and the prejudice resulting from it. First, it comments that declarations tendered at the state evidentiary hearing were not offered into evidence. (Slip Op., p. 15989.) This is not correct. In fact, all of the declarations submitted at the evidentiary hearing were offered and received for the truth of their contents. (See RT 663–664.) Next, the Court notes that

---

6 See, e.g., Amadeo v. Zant, 486 U.S. 214, 226 (1988) ("Petitioner's trial lawyers, who were no longer representing him when they testified at the evidentiary hearing, had significant incentive to insist that they had considered every possible angle: they had lost a capital murder trial, and another lawyer had uncovered evidence of serious constitutional error in the proceedings."); see also, Edwards v. Lamarque, ___ F.3d ___ (2005 WL 3358845) (9th Cir. December 12, 2005) (fn 4: trial lawyer's explanation dismissed as "post-hoc creativity in trying to undo the harm he had already incurred").

additional declarations were appended to the exhaustion petition, but that they were not part of the record at the state evidentiary hearing. While that is correct, that does not mean they are not part of the record before this Court. The state court did not exclude these declarations from consideration when it denied this claim in the exhaustion petition as having previously been raised, and thus they are part of the record.

Finally, the opinion fails to appreciate the importance of a careful and thorough social history in penalty phase preparation and litigation. Cases like Williams v. Taylor, supra, and Wiggins v. Smith, supra, reversed death judgments because they recognized the pivotal role that such information plays in shaping the jury's determination. Moreover, the aggravation in this case is not especially egregious on the scale of capital-eligible offenses, despite the catch-phrase "one-man crime wave" that the California Supreme Court used, and that has followed in other opinions. The panel fails to acknowledge that there are greater and lesser crime waves, and other capital appellants have received relief for ineffective assistance at penalty phase notwithstanding far more daunting crime waves than existed here,[7] and the mitigation that could have been developed and presented is extensive. Although the Court views trial counsel's penalty phase argument as a "forceful case for mitigation," (Slip Op., p. 16002), a fair reading of that argument

---

7 See, e.g., Mak v. Blodgett, 970 F.2d 614, 620-621 (9th Cir. 1992) (murder of 13 innocent victims).

indicates that it was short, tepid and, most important, unsupported by the factual mitigating predicates that might have persuaded the jury to render a life verdict for defendant. While it is true that "the jury already knew something of his background," (id. at 15991), knowing "something" is not the proper test. Appellant's counsel should have provided the jury with all of the available mitigation in his case. Instead, this is a case in which trial counsel presented *no* evidence in mitigation at penalty phase.

CACJ respectfully submits that if allowed to stand, the panel's ruling is likely to result in verdicts skewed by non-statutory and extra-legal evidence and doctrines. Moreover, the panel's analysis of counsel's performance during trial cannot be harmonized with this circuit's existing decisions, and the analysis undermines ongoing efforts to require effective representation in capital cases.

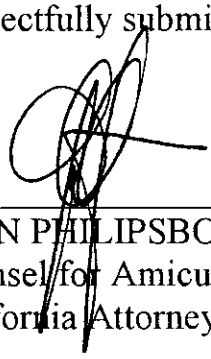
CONCLUSION

Petitioner did not receive the fair trial to which he was entitled, both because the jury consulted Biblical law in making its penalty determination and because trial counsel provided seriously deficient representation. The panel opinion reaches the wrong result in appellant's case, and in doing so it countenances (1) jurors' reliance on Biblical or other law in lieu of the laws of California, and (2) substandard legal representation, both of which undermine the protections

established by previous decisions of this Court and the United States Supreme Court. Accordingly, rehearing is appropriate.

DATED: February 22, 2006

Respectfully submitted,



JOHN PHILIPSBORN
Counsel for Amicus Curiae,
California Attorneys for Criminal Justice

Docket Nos. 00-99005 and 00-906

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE L. FIELDS,

Petitioner-Appellant,

v.

STEVEN ORNOSKI, WARDEN, SAN QUENTIN STATE PRISON,

Respondent-Appellee.

/

D.C. No. CV-92-00465-DT

DEATH PENALTY CASE

AMICUS BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

The California Council of Churches ("Council") submits this brief amicus curiae in support of the Appellant's Petition for Rehearing filed by Petitioner/Appellant STEVIE L. FIELDS, pursuant to F.R.A.P., rule 29(a). Appellant seeks rehearing of this Court's decision, filed December 8, 2005. (Fields v. Brown, 431 F.3d 1186 (9th Cir 2005).)

SOURCE OF AUTHORITY TO FILE THIS BRIEF

Pursuant to F.R.A.P., rule 29(a), counsel for appellant and respondent each granted consent to filing this brief, as described in confirming letters, copies of which are being lodged with the Clerk concurrently with the submission of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

The California Council of Churches ("Council") if a non-profit corporation representing 51 Protestant and Christian Orthodox denominations and judicatories, which have 1.5 million church members across California. It is affiliated with the National Council of Churches, which represents Protestant Christians across the United States. The Council is particularly concerned about that portion of the Ninth Circuit's opinion in the above-captioned case regarding the jury foreperson's introduction of passages from the Bible into the jury's deliberations. We wish to offer a response to what we believe was the foreperson's misuse of Hebrew and Christian Scriptures, and the Court's misplaced tolerance of this misuse. The Council is deeply disturbed by this distortion of the role of religious faith trial courts. We urge this Court to grant rehearing or rehearing *en banc*, to take a firm and clear position against permitting the holy writings of any faith community from being used, and misused, in courtrooms and jury rooms.

I. STATEMENT OF THE CASE

A. The Jury Foreperson's List

In the penalty phase of Appellant Fields' trial for murder, after just two hours of deliberation, the jury and their foreperson, Rodney White, went home where he checked his Bible "and other reference texts," from which he made notes, arranged in two categories: reasons for imposing the death penalty, and reasons against that choice. See Appendix A for the items included in Mr. White's categories.

Mr. White identified *no* scriptural passages that challenged the imposition of capital punishment, not even the obvious, "Thou Shalt Not Kill." At least some jurors saw the notes or received the information in them when the jury reconvened, and the notes were discussed. The jury returned its verdict, recommending death, by 3:00 p.m. that day.

Mr. Fields raised a claim of juror misconduct based on these facts. The district court found that the jury's consideration of Mr. White's biblical references brought religion improperly into the sentencing process.

B. The Ninth Circuit's Opinion

This Court reversed the district court's grant of penalty phase relief. Fields v. Brown, 431 F.3d 1186, 1209 (2005). Important to this decision were several misconceptions about religion and religious people: First, this Court disagreed with the district court's assumption that the Biblical references are extrinsic, factual material. Instead, comparing the jury's discussion in Mr. Fields' case to one in which the jury discussed a telephone call that bore on the defendant's motive, this Court concluded, "White's Bible verses are not of this sort; they are not, in fact, facts at all." Fields at 1209. The distinction between facts and passages from the Bible is not the issue. Rather, at issue is the prejudicial impact of introducing religiously charged biblical *commandments* into a jury's deliberations.

While acknowledging that some biblical passages are more familiar than others, this Court suggests that Mr. White's notes were no more prejudicial than would be reciting well-known adages from memory. "Sharing notes is not constitutionally infirm if sharing memory isn't." Id. The Court asserts that the concepts "an eye for an eye" and "he who lives by the sword, shall die by the sword" are well known, and that all of Mr. White's "for" passages followed these principles. In fact, Mr. White *did not* cite the second passage noted in the opinion (which is from Matthew 26:52), and this Court does not address, in its broad-brush interpretation, the substantially different message of the passage from Romans 13, which the jury foreperson used to demonstrate the God-given authority of government to maintain order and inflict punishment. This passage, too, is assumed to convey a well-known concept that Mr. White would have been free to expound from memory. In fact, the concept is *not* well known in most circles, including churchgoers, and according to the Court's account, even Mr. White had to check his Bible *and other references* to make his list.

The Court also distinguishes between the impact of a prosecutor's citation of religious authority and the effect of a juror's citation, reasoning that jurors are not under the same limitations as prosecutors. The Council submits that whether it is the prosecutor or a juror bringing in religious authority, the deleterious effects are the same.

The Council submits this brief in support of Mr. Fields' Motion for Rehearing and Suggestion of Rehearing *En Banc* in the hope that its expertise on religious matters will be helpful to this Court regarding some of its statements and assumptions about Christians and the Bible, as well as in dispelling some common myths about religious matters. In sum, the Council urges this Court to stand strongly against tolerating the use of the Bible or any other religious writings, whether offered by prosecutors *or* jurors to supplant state law during deliberations.

II. ARGUMENT

A. The Bible is Not as Well-Known Among Laypersons as the Court's Opinion Suggests, and Use of Proof-Texts and Efforts to Utilize Biblical Authority Would Create Confusion, Inject Outside Unvetted Influence Into the Jury Deliberations and Endanger the Separation of Church and State.

It is the experience of pastors, teachers and leaders within the Council that "average Americans," even including those who attend churches or synagogues, are generally not very familiar with the Bible. They may have committed isolated verses to memory, and a small minority may be able to conduct rudimentary research using a concordance or other reference work, but relatively few are familiar with the socio-political settings in which various portions of the Bible were written, the influence of translation (particularly from ancient Eastern languages into modern Western languages), and the impulse of the Bible as an entire work, not just as a source of individual proof-texts.

A proof-text is the use of an isolated passage from Scripture applied directly to modern-day situations as a comfort, a solution or a justification. Using proof-texts alone, however, is not sufficient to support a biblical case: Just as lawyers and judges consider the context and history of laws and jury instructions, so must people seeking the true meaning of scriptural passages consider the context and social/political history. In fact, it is even more important because the Bible and other holy writings originated in wholly different times and cultures from our own.

The jury foreperson's use of a few select texts to make his point is quite typical of a proof-texting approach that makes no reference to the broader context of a selected passage. For instance, just prior to the first appearance of the famous "eye for an eye" passage in Leviticus 24, Moses was directed to use stoning to ensure that God's name not be taken in vain: "And he that blasphemeth the name of the Lord, he shall surely be put to death and all the congregation shall certainly stone him." Leviticus 24:16a (KJV). This directive would seem to have authority equal to the "eye for an eye" commandment, but when both are read in the context of the entire Bible (especially, for Christians, in the context of Jesus' teachings), and with historical and socio-political understanding, *both* are moderated.

An example of the danger of using Scripture to support a particular political or personal proposition (in a very different set of historical circumstances), the Apostle Paul's words have been used to support the continuation of slavery: "Slaves must be respectful and obedient to their masters, not only when they are kind and gentle, but

also when they are unfair." I Peter 2:18 (Jerusalem Bible). Other biblical passages have been and are used, in isolation and without context, to support the propositions that slavery and separation of the races is endorsed by God.

This great potential for manipulation is not widely appreciated, particularly within American Christianity. In order to assert that "the Bible teaches ...," it is important both to explore the teaching of the Bible *as a whole within its cultural context*, and to "translate" its teachings into our time and context. To introduce into the jury room a series of biblical references without setting them in context, analyzing the translation, and balancing the teachings of the whole of biblical literature risks allowing juries to consider misleading material and subjective opinion in the guise of "biblical truth."

To allow injection of the holy teachings of any faith community is highly problematic. One can envision the misuse of individual sura from the Qu'ran by a Muslim juror in arguing in a penalty phase setting that 9/11 conspirators were less culpable, or the use of Zen Buddhist concepts to argue that police officers who used excessive force were highly culpable. Resort to the precepts of a "higher authority" than the law given to the jury by the trial court would endanger the separation of church and state, as courts have already recognized in precluding prosecutors from invoking religious authority.

Permitting the jury to be exposed to "biblical truth" is likely to be even more damaging than introducing mere extra-judicial facts: What Mr. White purported to

bring to the jury room were *commandments*, handed down to humanity *by God,* applicable throughout time and eternity. Rather, the narrow, skewed representation of "biblical truth" that he produced was merely his own belief system, given unwarranted authority by a claim of biblical imperative.

B. Using the Bible to Justify Capital Punishment Ignores Important Religious Teachings and Scholarship, and is Particularly Dangerous in "Death-Qualified" Jury Pools Because Such Jurors are Hindered in their Ability to Judge the Case on the Underlying Facts and Reasoned Moral Judgment.

A problem with allowing any one juror to bring selected verses from the Bible into jury deliberations, without the guidance of jury instructions or argument on the subject, is that this person's understanding may, as appears to be the situation in this case, be offered as representative of the beliefs of all people who adhere to the Bible's teachings, and of the Bible's teachings as a whole. Because most people have at best a rudimentary understanding of the Bible, a juror with only a little more knowledge than his peers can easily have unwarranted influence over them.

The Council perceives that Mr. White's intention in creating his list and bringing it in to share with other jurors was to exert influence over them. As foreperson, he may have viewed it as his civic duty to bring enlightenment to other members of the jury. The lop-sidedness of the list, however, reveals Mr. White's limited knowledge of the Bible, or his bias, or both.

We note, again, that even the most well-known edict on the subjection of killing another human being is not included in Mr. White's "against" list: the

commandment "thou shalt not kill." Exodus 20:13. Of course, even that apparently clear-cut commandment from Hebrew Scripture is really not simple at all. It is often debated whether this should be translated, "You shall not murder." The Hebrew is ambiguous.

Moreover, any use of Torah law, and especially the Priestly Code (from which the verse from Leviticus that Mr. White used is taken), would require taking the whole body of ancient laws seriously. Biblical scholars are under obligation to their own canons of interpretation. As noted above, the death penalty was instituted in the early Hebrew community for many offenses in addition to murder, such as prostitution, talking back to one's parents, gluttony, excessive drinking, a male's refusal of circumcision, and blaspheming. These laws of early Israel were, however, modified very early in the tradition. Even ancient Hebrew society did not follow the "eye for an eye" precept of justice. Moreover, it is intellectually and religiously inappropriate to support life and death decisions in contemporary society based on the ancient laws of an ancient society.

Just two thousand years ago (as compared to the four or five thousand years we are removed from ancient Israel), Jesus taught that the old ways no longer applied. While the ancient "eye for an eye" concept is often cited, a balanced presentation of the teachings of the Bible as a whole cannot ignore Jesus'

modifications of that commandment.[1] Moreover, in addition to Jesus' repudiation of the *lex talionis*, the Talmud denies its literal meaning, replacing it with financial remedies for those who have been wronged by others. Talmud, Bava Kama, 83b; Mishpatim 5763.[2]

As was the custom at the time, using overstatement as a rhetorical and teaching tool Jesus broadened the notion of condemnable sin to make the point that none of us is without blame and that to sin in one's heart is the moral equivalent of sinning in action.[3] Jesus often sought to move the ancient law to a higher moral level of forgiveness and love.

Similarly, students of the book of Romans must read the entire epistle to put the passage Mr. White copied in context. The Apostle Paul was writing to nascent churches that included both Jews and Gentiles who were in conflict over how to live

---

[1] In the Sermon on the Mount, Jesus said: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist an evil doer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile. Matthew 5:38-41 (NRSV).

"You have heard that it was said, 'you shall love your neighbor and hate your enemy.' But I say to you, Love your enemies and pray for those who persecute you, ..." Matthew 5:43-44 (NRSV)

[2] Union for Reform Judaism, (*www.urj.org/Articles/index.cfm?id=2901&pge_prg_id=14088&pge_id=3448*)

[3] "You have heard that it was said to those in ancient times, 'You shall not murder': and 'whoever murders shall be liable to judgment.' But I say to you that if you are angry with a brother or sister, you will be liable to judgment; and if you insult a brother or sister you will be liable to the council . . . ." Matthew 5:21-22a (NRSV).

this new life. Should Jewish law – which required, *inter alia*, that Jews should obey the secular authorities because their authority derives from God – prevail? Or should the old laws and ways be disregarded, because of Jesus' new teaching of grace? Paul's repeated theme is that the new law, that we must love our neighbor as ourselves, is the final authority. The epistle is full of practical advice for people trying to live this new faith, with each other and in a vastly pluralistic society.

Mr. White seems to have missed this "against" scripture, despite its proximity to the passage he quoted: Paul urges these new believers to "never avenge yourselves, but leave room for the wrath of God; for it is written, 'Vengeance is mine, I will repay, says the Lord'" and "Do not be overcome by evil, but overcome evil with good." Romans 12:19, 21 (NRSV). The directive immediately following, to obey the secular authorities, recommends avoiding the trouble that would come with refusing to pay taxes and to follow other laws. The teaching of Jesus to "[g]ive therefore to the emperor the things that are the emperor's, and to God the things that are God's", Matthew 22:21 (NRSV), is the orthodox teaching in this area. Mr. White failed to point out that "what is God's" in this case could be the vengeance of death, and to have suggested this to the jury would have been just as improper as suggesting that the Bible "supports" the imposition of the death sentence. The letter to Romans is a guidebook for individuals, not a political science manifesto demanding eternal obedience to the existing government in everything; if it had always been understood in that way, the Western world would still be following Roman law!

This Court was correct in pointing out that death-qualified jurors are required to make a decision as to sentence based upon the underlying facts and consider their decision as a "'matter of reasoned moral judgment.'" Fields at 1209. However, the danger of a one-sided presentation of reasoned moral judgment as was exhibited by Mr. White is that in death-qualified jury panels potential jurors who are faithful to the teachings of these majority mainline Protestant, Catholic and Jewish denominations may not even be seated on a capital jury because they cannot honestly represent a willingness to consider imposing the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). Thus, ironically, the death-qualification process effectively removes from every capital jury the possibility of seating a spokesperson for an interpretation of the Bible that is more inclusive, more scholarly, and more balanced than that offered by Mr. White. If the jurors who are seated are allowed to conduct strained, shallow and unguided biblical research and to share the results with other jurors, the effect is doubly detrimental in that the possibility of reasoned moral judgment is diminished. Not only is defense counsel denied an opportunity to confront the effect of introducing religious commandments into the jury's deliberations, but the jury itself is deprived of anyone who is equipped to challenge the unbalanced and possibly erroneous biblical interpretation offered by jurors whose scriptural understanding is similar to Mr. White's.

C. All Major Denominations of Christianity and Judaism Have Rejected Interpretations of Scriptures that Endorse Capital Punishment.

The reading of Hebrew and Christian Scripture that leads to a conclusion that the Bible endorses capital punishment without reservation or revision has been rejected by all major denominations of Christianity and Judaism. These organizations have adopted statements in opposition to the death penalty, at least as exercised in the United States today, and many oppose it under any circumstances.[4] The Council has adopted the following statement:

> **California Council of Churches (California IMPACT Legislative Principles):** "We believe that capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ; that, as Christians, we must seek the redemption of evildoers and not their death; and the use of the death penalty tends to brutalize the society that condones it."

D. The Concerns Associated with a Prosecutor's Invocation of Religious Authority are No Less Valid When a Juror Invokes Religious Commandments.

This Court identified three reasons a prosecutor is not permitted to present arguments in favor of the death penalty based on religious authority: To do so would (1) frustrate the purpose of closing argument, "which is to review the evidence presented at trial that is relevant to the jury's decision as defined by the instructions given by the court;" (2) violate the constitutional requirement that the jury's sentencing discretion be narrowly channeled; and

---

[4] See Appendix B for a sample of these statements.

(3) reduce the juror's sense of responsibility for imposing the death penalty. Fields at 1209.

In the view of the Council, these concerns are no less valid when a juror is permitted to bring to the jury's deliberations, not merely his own recollections of religious teachings, but supposedly verbatim passages he found with hasty and unreliable research. The jury has the difficult task of deciding whether the defendant should spend the rest of his/her life in prison or be executed. The decision may be normative, but constitutionally, it is to be based on evidence and law presented *in court*, not on unguided, unexamined commandments from an outside source that many believe transcends the legal instructions given by the trial court. Instead of narrowly channeling the jury's sentencing discretion, scriptural passages may appear to *require* death to anyone who murders another, without consideration of circumstances California and constitutional law require a jury to consider.

CONCLUSION

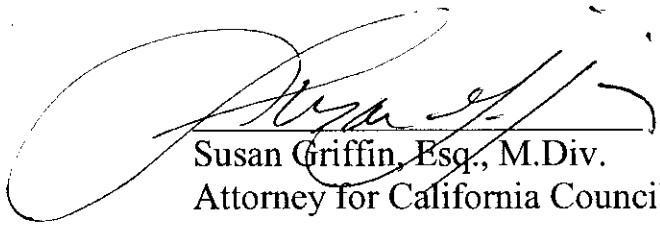
To permit a supposedly divine directive to be considered by the jurors is highly likely to invite consideration of aggravating facts and issues far different from those permitted by California law, and permits jurors to feel less responsible for making this enormous decision because, after all, "the Bible tells me so."

The California Council of Churches urges this Court to grant rehearing and revisit the proper role of holy writings in jury trials, and particularly in capital trials.

DATED: February 21, 2006

Respectfully submitted,

GRIFFIN & SULLIVAN



Susan Griffin, Esq., M.Div.
Attorney for California Council of Churches

00-99005 and 00-99006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS,

Petitioner/Appellant/Cross-Appellee,

v.

EDDIE YLST, Warden, San Quentin State Prison,

Respondent/Appellee/Cross-Appellant.

CAPITAL CASE

On Appeal from the United States District Court for the District of California
Case No. CV 99-56460
The Honorable Dickran Tevrizian, Jr., Judge

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

KRISTOFER JORSTAD
Deputy Attorney General
State Bar No. 66355
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2275
Fax: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent/Appellee/Cross-Appellant

00-99005 and 00-99006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS,

Petitioner,

v.

EDDIE YLST, Warden, San Quentin State Prison,

Respondent.

Petitioner Stevie Lamar Fields seeks panel rehearing and rehearing en banc on three grounds[1/]. First, he challenges the panel's determination that the jury's use of Biblical quotations and dictionary definitions during penalty phase deliberations neither violated the Constitution nor prejudiced him.[2/] Second, he contends that the panel erred in upholding the district court's factual findings that

1. Pursuant to Fed. R. App. P. 43(c)(2), Eddie Ylst should be substituted for his predecessor, Jill Brown, as Acting Warden of San Quentin State Prison.

2. Petitioner does not seek any review of the panel's determination of the propriety of the foreman's itemized list of arguments for and against capital punishment free of any religious connotation or allusion, such as, for example, lack of deterrence, fitting the punishment to the crime, discriminatory selection, human fallibility or rehabilitation.

Juror Hilliard did not respond dishonestly to questions on voir dire, and that he was neither actually nor impliedly biased. Third, petitioner maintains that the panel mistakenly concluded that he was not prejudiced by trial counsel's assertedly deficient performance in failing to investigate and present mitigating evidence at the penalty phase.

None of these contentions warrants further review by this Court. Rehearing en banc is not required to "secure or maintain uniformity of the court's decisions," (Fed. R. App. P. 35(a)(1)), because nothing in the panel's analysis or conclusions is inconsistent with any other decision of this Court, or of any other court of appeal, for that matter. The petition also does not present "a question of exceptional importance," within the meaning of Fed. R. App. P. 35(a)(2), because the panel's resolution of petitioner's three claims applies well-settled principles and precedent to dispose of familiar claims of error.

REASONS WHY REHEARING AND REHEARING EN BANC SHOULD BE DENIED

I.

THE PANEL CORRECTLY FOUND THAT PASSAGES FROM THE BIBLE QUOTED DURING PENALTY PHASE DELIBERATIONS WERE NOT EXTRANEOUS FACTUAL MATERIAL, AND THAT THEY DID NOT HAVE A SUBSTANTIAL AND INJURIOUS EFFECT ON THE TRIAL'S OUTCOME

No court has ever held that the Constitution prohibits jurors from quoting the Bible during penalty phase deliberations. Petitioner asks this Court to do just that. He characterizes the panel's decision as "an unprecedented new rule," but judicial tolerance of jurors' expression and exchange of *their own* moral and religious beliefs in penalty phase deliberations is a traditional, unremarkable, and sound rule. Instead, it is the rule petitioner seeks that would have no basis in history or precedent or reason. Indeed, to hold that the Constitution is violated when a juror says, or writes down in a note, "an eye for an eye" during penalty phase deliberations would be precisely the sort of precedent-shattering about-face that the anti-retroactivity rule of *Teague v Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), was designed to bar.[3/]

---

3. Petitioner mentions the jury's consideration of dictionary definitions of three words only in passing, and does not ask for reconsideration of the panel's disposition of this part of his claim. Also, as noted earlier, petitioner does not challenge, or even mention, the jury's consideration of the non-religious

Petitioner presents versions of what happened at trial and what the panel held that bear little resemblance to reality. He grossly misstates what the jury foreman did, and he exaggerates to the point of distortion the analysis and the conclusions reached by the panel. He argues that the foreman's notes were "religious mandates" that "contaminated the process" by "command[ing] the imposition of the death penalty." Pet. at 1, 5. In fact, the foreman's notes contained arguments both for *and against* capital punishment, which did no more than inform the exercise of reasoned moral judgment by the jury. There is no indication that the foreman presented the ideas reflected in his notes for the purpose of negating or overruling the judge's instructions. More basically, there is no evidence of any kind, certainly no admissible evidence, which shows that the jury disregarded the trial court's concededly full and complete instructions and substituted a "higher law" to decide petitioner's sentence.

Petitioner's alarming rendition of the conduct of the jury foreman, as well as his apocalyptic forecasts of what the panel's opinion "permits," are fantasies. The fantasies are useful because they give petitioner and his *amicus curiae* convenient foils to add drama to their overwrought argument. Petitioner is alarmed at the thought that religiously-informed ethical notions might infiltrate the

---

arguments for and against the imposition of the death penalty expressly listed in the foreman's notes.

jury room during deliberations at a penalty phase. But he is alarmed by a basic reality that has been with us for a very long time. More specifically, petitioner's accounts do not accurately, or even remotely, describe what happened, either at the trial a quarter century ago, or in the opinion of the panel.

There are four key elements in the panel's analysis of the juror misconduct issue which petitioner either distorts or ignores. First, the panel did not "permit" or endorse or condone what the jury foreman did. It disapproved of what he did: "Certainly Biblical verses are not the sort of material that should have been made part of the record." *Fields v. Brown*, 431 F.3d 1186, 1209 (9th Cir. 2005). But the panel did not end its inquiry there. It continued on to the all-important issue of prejudice, properly finding that the introduction of the foreman's notes did not have a substantial and injurious effect on the verdict. That makes this case indistinguishable from the multitude of cases where courts find improper juror conduct, but no prejudice. It is absurd to argue that a court "permits" or encourages an error simply because it finds that the error caused no prejudice warranting reversal.

Second, the panel noted that Biblical verses are simply not extrinsic factual evidence relating either to petitioner or to his crimes: "they are not, in fact, facts at all." *Id.* None of the quotations from the Bible contained or imparted any

information about petitioner or his crimes, and in this respect alone they are not the kind of extraneous factual information that is traditionally disallowed and deemed prejudicial by courts. Rather, the quotations belong to the category of the "'general knowledge, opinions, feelings and bias that every juror carries into the jury room.'" *Id.*, quoting *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

Third, the panel cut to the heart of the matter by pointing out that it would be untenable to contend that the jury foreman "was not free to recite these verses or resort to their reasoning in support of whatever position he took." *Fields*, at 1209. In other words, "[s]haring notes is not constitutionally infirm if sharing memory isn't." *Id.*

Fourth, the panel found that petitioner was not prejudiced by the foreman's notes, even assuming they are deemed extrinsic or improper. This finding is soundly based on the fact that the notes did not present a one-sided divine "command" to impose the death penalty, that the aggravating evidence was unusually powerful, and there is no indication that the jurors failed to follow the instructions on the law as given by the trial judge. *Fields*, at 1210.

Nothing in the petition before the Court undercuts the panel's analysis or casts doubt on its conclusions.

A. The Foreman's Notes Were Not Extrinsic Evidence

The panel correctly rejected petitioner's key argument that the foreman's notes constituted "extrinsic evidence." The panel correctly categorized the information in the notes as part of that fund of knowledge and belief that finds its source in everyday life and experience, and which jurors are expected to bring to bear in their deliberations. In the panel's succinct formulation, the Biblical verses are not extrinsic evidence or factual material: "they are not, in fact, facts at all." *Fields*, at 1209. This basic perception is unremarkable, and it does not conflict with any other opinions of this, or any other, federal court. "Extraneous information" refers to facts about the defendant or the case which were not admitted into evidence. Bible verses are not evidence.[4/]

Very recently, this Court reiterated its settled definition of extrinsic evidence. In *Raley v. Ylst*, No. 04-99008___ F.3d ___, 2006 U.S. App. LEXIS 9310 (9th Cir. April 14, 2006), the Court rejected a claim that a jury's consideration of a defendant's decision not to testify, his possible eligibility for release on parole if sentence to a life term, and the comparative costs of death and life-without-parole sentences was improper consideration of extrinsic evidence.

---

4. Significantly, neither *amicus* seriously dispute this finding. Both *amici*, in fact, argue on the assumption that Bible verses are not facts. Brief of California Attorneys for Criminal Justice, at 5; Brief of California Council of Churches, at 3.

Citing several other Ninth Circuit cases, the Court held that extrinsic evidence that had been found to be prejudicial typically consisted of information about a defendant's violent disposition, criminal history, or other specific factual information relating to the defendant or his crime. *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995) (juror stated defendant had a reputation for violence); *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (information of prior armed robbery conviction); *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991) (juror conducted experiment); *Dickson v. Sullivan,* 849 F.2d 403, 406 (9th Cir. 1988) (bailiff said he "had done something like this before").

In *Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006), a recent case citing and following the panel's decision in the instant case, the Fourth Circuit agreed that recitation of passages from the Bible had "no bearing on any fact relevant to sentencing, and was therefore not tantamount to 'evidence' that was used against [petitioner] at sentencing." More particularly, the *Robinson* court found that no Biblical passage "had any evidentiary relevance to the determination of the existence of these aggravating and mitigating circumstances." *Id.*

The court went on to observe that "the Bible is not analogous to a private communication, contact, or tampering with a juror," because

the reading of Bible passages invites the listener to examine his or her

own conscience from within. In this way, the Bible is not an "external" influence. In addition, reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence.

Id. at 363-64. These considerations, which parallel the panel's analysis here, derive from the common sense recognition that scriptural passages such as those quoted in the foreman's notes are part of many jurors' ethical principles or general knowledge. This knowledge is not "extraneous" or "external" to the profound question of deciding a penalty. It is central to the application of the "reasoned moral judgment" which jurors are called upon to make.

None of the cases petitioner cites holds that deliberating jurors are forbidden by the Constitution from reciting passages from scripture from memory during deliberations. And two of these cases point up how awkward and anomalous it is to adopt the view that expressing a thought based upon memory is permissible, but conveying exactly the same thought written down on paper is not. In *Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989), the Court found constitutional error when the *trial court* was aware of and approved the use of a Bible in a jury room[5/], but went to great lengths to explain the narrow reach of its

---

5. The trial judge's knowledge and tacit approval of the use of the Bible is, as the panel here recognizes, what distinguishes this case from cases where a state

decision:

> The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen. There is thus no issue raised here as to possession, even in the jury room, of personal Bibles, perhaps even consulted for personal -- not group -- inspiration or spiritual guidance. . . . The sole issue here involves the at least implied *court approval* of group jury reference to an extra-judicial authority -- here the Christian Bible -- for guidance in deciding the explicit, statutorily mandated, carefully worded guidelines which must be followed by a jury deliberating during the sentencing phase of a death penalty case.

Id. at 1560 (emphasis added). In the instant case, the trial court neither knew nor approved of the foreman's notes, so the holding in *Jones* simply does not apply.

In *Harlan v. Colorado*, 109 P.3d 616 (2005), the court repeatedly emphasized that its decision was based on Colorado law, not the federal Constitution. But the majority opinion reached the bizarre conclusion that reciting a quotation from memory is permissible, but reading the very same

---

actor oversteps the bounds of his authority. *Fields*, 431 F.3d at 1209-10.

quotation in written form is not:

> We do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs in making the extremely difficult "reasoned judgment" and "moral decision" he or she is called upon to make in the fourth step of the penalty phase under Colorado law. We hold only that it was *improper for a juror to bring the Bible into the jury room* to share with other jurors the written Leviticus and Romans texts during deliberations; the texts had not been admitted into evidence or allowed pursuant to the trial court's instructions. . . . The written word persuasively conveys the authentic ring of reliable authority in a way the recollected spoken word does not.

Id. at 632. This distinction is both incoherent and inapplicable here. No Bible entered the jury room in this case. As the dissent astutely points out, the majority

> concludes that this otherwise proper information, i.e., the discussion of generally known biblical passages, somehow becomes an extra judicial code that supplants Colorado law when presented in written form. . . . It makes little sense, therefore, that the exact same passage in written form is somehow enshrined with an authority that the spoken or remembered

passage lacks.

Id. at 638. The panel in the instant case avoids the contortions necessary to sustain this nonsensical distinction by approaching the issue from a pragmatic and realistic vantage. That is, the panel understood that the fact that the foreman made notes of several passages from the Bible and several dictionary definitions of relevant terms did not transform that material into prejudicial extraneous evidence.

It is no more improper or prejudicial for a juror to take into account ethical notions derived from the Bible than it would be to discuss the ethics of the Buddha or Muhammad, or Nietzsche or Gandhi. Jurors should not be forbidden to cite or quote the *lex talionis* found in Hammurabi or the Book of Exodus,[6] or Gandhi's retort,[7] or the Beatitudes of Jesus,[8] or Kant's categorical imperative.[9] Juries are not such delicate organisms that they need to be protected by thought police. Nor are they sterile laboratories that must be insulated against "incorrect" references to the deepest sources of morality. A penalty phase jury weighing

---

6. "An eye for an eye."

7. "If we practice an eye for an eye and a tooth for a tooth, soon the whole world will be blind and toothless."

8. "Judge not that you be not judged."

9. "Act only according to that maxim by which you can at the same time will that it should become a universal law."

aggravation and mitigation engages in a debate between retribution and mercy, between punishment and rehabilitation, which is not "extraneous" to its task. It is the heart of that task.

Once the jury determines that the defendant is eligible for the death penalty, the nature of the proceedings fundamentally changes. The California Supreme Court has held that the question at the penalty phase is by its nature not one of fact. Instead, the penalty jury is confronted with question of whether death is the appropriate punishment, and is expressly required to apply normative rules of ethics. *People v. Hayes*, 52 Cal.3d 577, 643, 802 P.2d 376, 418 (Cal. 1990). Under the Constitution, once a defendant has been found eligible for the death penalty, "complete jury discretion is constitutionally permissible." *Buchanan v. Angelone*, 522 U.S. 269, 277, 118 S. Ct. 757 (1998); *Tuilaepa v. California*,512 U.S. 967, 979-80, 114 S. Ct. 2630 (1994); *Zant v. Stephens*, 462 U.S. 862, 875, 103 S. Ct. 2733 (1983). Surely that discretion includes a juror's right to consult his or her own conscience, even if that conscience has been shaped by religious experience.

Under these circumstances, jurors cannot be required to set aside the values and insights derived from their life experiences. On the contrary, they should be encouraged to apply their deepest moral beliefs. This Circuit has

repeatedly acknowledged that it is proper for a juror to consider "the general knowledge, opinions, feelings and bias that every juror carries into the jury room." *Hard v. Burlington N. R.R. Co.*, 870 F.2d at 1461. Religious belief frequently animates and informs ethical codes and value systems. It does not contaminate a jury room. The Constitution does not forbid quoting the Bible in the jury room.

B. The Foreman's Notes Did Not Present A Divine Command To Impose The Death Penalty, Nor Did They Supplant The Trial Court's Instructions

The foreman's notes, considered objectively, do not present a "command" from God to impose death. On the contrary, the list spells out religious and non-religious arguments for and against capital punishment. In fact, the notes reflect and rehearse the familiar and well-worn arguments concerning capital punishment, pro and con, which routinely occur in jury rooms, and many other places as well. This even-handed feature distinguishes this case from every one of the cases petitioner cites involving a jury's resort to Biblical sources. On that basis alone, rehearing should be denied.

Much of petitioner's argument hinges on the premise that the Biblical quotations supplanted the trial court's instructions. Even assuming that these passages can be deemed extrinsic evidence, there is a long line of precedent, noted by the panel, which "distinguishes between juror testimony about the

consideration of extrinsic evidence, which may be considered by a reviewing court, and juror testimony about the subjective effect of evidence on the particular juror, which may not." *Sassounian v. Roe*, 230 F.3d 1097, 1109-09 (9th Cir. 2000); *see also Tanner v. United States*, 483 U.S. 107, 124, 107 S. Ct. 2739 (1987) (holding that Fed. R. Evid. 606(b) does not violate the Sixth Amendment, and noting that the Rule does not "open[ ] verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleges that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations" (quoting S. Rep. No 93-1277, p. 13-14 (1974))." In other words, no testimony about the effect of extrinsic evidence is admissible. Reviewing courts must evaluate the prejudicial effect of the extrinsic evidence objectively.

Viewed objectively, the foreman's notes are not the one-sided invocation of divine authority commanding a death sentence petitioner describes. On the contrary, they carefully set forth religious and non-religious arguments both for and against capital punishment. See *Fields*, at 1206-08, ns. 12, 13.

Petitioner and both *amici* suggest that the foreman's notes raise the specter of a religious zealot commandeering the penalty phase deliberations, but the notes objectively show that the foreman's interest was in presenting a thorough and

thoughtful agenda for the debate, with all viewpoints and considerations taken into account. Petitioner and the *amici* would have the Court find blind, one-sided fanaticism. The notes show earnest and deliberate balance.

Recognizing the difficulty this basic fact presents for his argument, petitioner strives to equate this case to cases in which a prosecutor invokes a higher power or a higher law to overrule a judges' instructions and call for an execution. *Sandoval v. Calderon*, 241 F.3d 765, 775-776 (9th Cir. 2001). As the panel properly held, there is no comparison, and petitioner cites no authority which finds such a connection.

Petitioner insists that the most prejudicial quotation in the foreman's notes is to Romans 13: 1-5, in which Paul counsels obedience to governmental authority. Petitioner offers his view that this passage is a command to obey the prosecutor's argument for death. The more reasonable objective interpretation of this passage is that it commands obedience to the law, as noted in the *Harlan* dissent:

> the plain meaning and well-accepted interpretation of this passage is that individuals are to obey the laws of their nation. See Matthew Henry, Commentary on the Whole Bible 2227 (Hendrickson Publishers 1991)(1721). Thus, in effect, this passage instructs individuals to follow

> the laws of Colorado. The laws of Colorado do not mandate the death penalty, but rather provide a four-step process that guides jurors in reaching a decision on sentencing in capital cases.

Harlan, 109 P.3d at 638 (Rice, J., dissenting). The law in this case was expressed by the trial court, not the prosecutor. Jurors were well aware that they had just witnessed an adversarial proceeding, with two sides arguing for different outcomes. They were also aware that the trial judge defined the law they were to apply, not one of the parties, and certainly not a jury foreman who had written down arguments for and against capital punishment in the abstract.

The panel correctly found that quoting the Bible did not supplant the trial court's instructions, and did not prejudice petitioner.

II.

THE PANEL CORRECTLY ACCEPTED THE DISTRICT COURT'S FACTUAL FINDINGS THAT JUROR HILLIARD DID NOT INTENTIONALLY MISLEAD THE TRIAL COURT ON VOIR DIRE, AND THAT HE HAD NO DISCUSSIONS WITH HIS WIFE DURING TRIAL ABOUT ITS SUBJECT MATTER THAT AFFECTED HIS ABILITY TO BE FAIR AND IMPARTIAL

Petitioner seeks rehearing on his claims that juror Floyd Hilliard misled the court during voir dire, and that he was either actually or impliedly biased. Petitioner's attack on the panel's resolution of these claims proceeds as if there

had never been a remand for factual findings, or an exhaustive evidentiary hearing, or detailed credibility and factual determinations by the district court. Rather than attempting to demonstrate that the district court's dispositive factual determinations are somehow clearly erroneous, petitioner simply acts as if they never happened. This is not a basis for rehearing.

In 2002, the panel deferred a ruling on the claims of bias, ordering the district court on remand to determine whether juror Hilliard intentionally misled the trial court when he volunteered information about the 1976 crimes against his wife, and whether Hilliard and his wife had discussions during the trial about its subject matter that affected his ability to be fair and impartial. *Fields v. Calderon*, 125 F.3d 757, 759 (9th Cir. 1997), *cert. den.*, 523 U.S. 1132, 118 S. Ct. 1826 (2002). The parties located Mr. Hilliard and his wife in Indiana, and deposed them on videotape. They also deposed two other jurors. Based on the entire record, the district court issued a lengthy memorandum with detailed factual findings, including specific credibility determinations based upon the demeanor of the witnesses. The court explicitly found that Hilliard did not lie on voir dire, and that he did not intend to mislead the trial court when he volunteered that his wife had been assaulted and beaten. These findings are fatal to petitioner's claim of actual bias, and he presents no basis to challenge them.

The panel also carefully considered petitioner's claim of implied bias.[10/] Once again, its resolution of this claim is based on facts, not the innuendo and speculation petitioner prefers to present. The panel concisely summarized the pertinent facts as found by the district court:

> The court found Hilliard credible, which means that he did not discuss the Fields trial beyond saying what kind of case it was, he did not buy his wife's speculation about Fields's being her assailant, he did not confuse the Fields case with the crimes against his wife, and nothing discussed with his wife affected his ability to be fair and impartial.
>
> It is Hilliard's impartiality that matters, not his wife's. We agree with the district court's conclusion that to the extent the Hilliards had discussions relating to the case, they were harmless, as the conversations did not affect Mr. Hilliard's ability to be fair and impartial.

Fields v. Brown, 431 F.3d at 1199.

---

10. The panel rejected respondent's argument that a finding of implied bias without dishonesty is barred by *Teague,* despite the panel's own statement on remand that "it is an open question whether dishonesty is required before bias may be found." *Fields v. Calderon*, 309 F.3d at 1105. The panel rejected the *Teague* argument by finding a single case decided before 1984 which held that bias could be found in the absence of juror dishonesty. *Fields v. Brown*, 431 F.3d at 1197. That case was a direct appeal in a federal prosecution, a holding not binding on the California Supreme Court, and certainly not precedent which would have compelled that court to grant relief. Respondent respectfully renews his contention that an "open question" is by definition a *Teague*-barred question.

Petitioner has not and cannot show that the district court's crucial factual determinations, especially its credibility findings, were clearly erroneous. He has not and cannot show that the panel's reliance on these factual findings is inconsistent with any other decision of this Court, or any other court, let alone that it presents a question of exceptional importance. Rehearing is not warranted on petitioner's claims of juror bias.

III.

THE PANEL CORRECTLY REJECTED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE ON THE GROUND THAT HE FAILED TO ESTABLISH PREJUDICE

Petitioner also seeks rehearing of the panel's determination that his claim of ineffective assistance of counsel at the penalty phase failed for lack of prejudice. The panel's conclusion was based in significant measure on a painstaking review of the extensive state evidentiary hearing on this claim, in which petitioner was represented by two highly experienced death penalty defense counsel, and after which the California Supreme Court unanimously rejected the ineffective assistance claim. *In re Fields*, 51 Cal.3d 1063, 800 P.2d 862 (1990). Nothing in the panel's decision upholding this determination warrants rehearing.

In reviewing the record of the evidentiary hearing on the ineffective

assistance claim, the state court aptly observed that the hearing gave petitioner a chance to

> show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different.

In re Fields, 51 Cal.3d at 1071, 800 P.2d at 866. The state court found that petitioner's weak showing paled in comparison to the aggravating evidence, and that petitioner had not shown that he was prejudiced by trial counsel's performance.

The panel concurred with the state court's conclusion for three basic reasons. First, in Justice Broussard's memorable phrase in the unanimous decision, petitioner was a "one-man crime wave" who was responsible for "one of the most agravated murder-with-special-circumstance cases to come before the court." *Fields*, 431 F.3d at 1186, 1202. After his release from prison for a previous homicide, petitioner embarked on a three-week crime binge which included a murder and at least three kidnapings, rapes and robberies. Second, at the state reference hearing, petitioner's proof of what counsel should have offered at the penalty phase was limited to the testimony of one aunt and of experts who

relied on hearsay declarations of questionable truthfulness. And third, the penalty phase was preceded by a sanity phase at which much of the evidence of petitioner's history, background and mental condition were presented to the jury. *Fields*, at 1202-03.

Under these circumstances, petitioner fell far short of demonstrating any prejudice from counsel's alleged shortcomings, and he has not justified rehearing.

CONCLUSION

For the stated reason, respondent respectfully submits that the petition for rehearing and the suggestion for rehearing en banc should be denied.

Dated: April 19, 2006

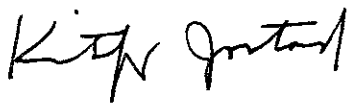
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General



KRISTOFER JORSTAD
Deputy Attorney General

Attorneys for Respondent/Appellee/Cross-Appellant

KJ:kj:ea
LA1999XF0006
60139628.wpd